(17,495.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 381.

E. M. PATTON, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 26, 1899.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1898, and held in the court-room of said court, in the city of New Orleans, before the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit; the Honorable Aleck Boarman, United States district judge for the western district of Louisiana, and the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Be it remembered that heretofore, to wit, on the 2nd day of May, 1898, a transcript of the record of the above-styled cause from the circuit court of the United States for the western district of Texas was filed in the office of the clerk of said United States circuit court of appeals in the words and figures following, to wit:

1 *Caption.*

Be it remembered, that there was opened and begun to be holden a regular term of the United States circuit court of fifth circuit and western district of Texas, at El Paso, Texas, on the fourth day of April, A. D. 1898, it being the first Monday in said month and the day fixed by law for commencing a regular term of said court at said place—present, the Honorable Thomas S. Maxey, United States district judge; Honorable Robert U. Culberson, United States district attorney; George L. Siebrecht, United States marshal for said district, and D. H. Hart, clerk of said court—when and where the following proceedings, among others, were had, to wit:

E. M. PATTON, Plaintiff,
versus
TEXAS & PACIFIC RAILWAY COMPANY, Defendant. } No. 173.

2 *Transcript from the District Court of El Paso County, Texas.*

Filed May 1st, A. D. 1893.

Caption.

Be it remembered, that on this the 3rd day of April, A. D. 1893, the same being the fourth Monday after first Monday in March, A. D. 1893, was begun and holden the hon. the district court of El Paso county, Texas, holding sessions in and for the April term, A. D. 1893, thereof.

Court met at 9 o'clock a. m.

Present and presiding: The Hon. C. N. Buckler, judge of said court. Other officers present: Hon. O. A. Larrazolo, district attorney; F. B. Simmons, sheriff, and J. A. Escajeda, clerk.

Plaintiff's Original Petition.

Filed March 17, A. D. 1893.

In District Court, El Paso County, Texas.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

To the honorable district court, El Paso county, Texas:

E. M. Patton, plaintiff, complaining of The Texas & Pacific Railway Company, defendant, respectfully states: That plaintiff is a resident of El Paso county, Texas, and the defendant is a corporation duly incorporated, doing business in El Paso county, Texas, and is now, and for several years has been engaged in the business of a common carrier, in said county, operating its line of railway therein, and now has as its local agent, representing it in said county, E. Thornton, Jr., who is a resident of said county.

That heretofore, to wit: on the first day of December, 1892, plaintiff was in the employ of defendant as fireman on one of its locomotive engines; that at about 11.40 a. m., on said da he came in on regular run, and at about 2 o'clock p. m. on said day, after dinner, he started back to do the work of filling up oil cans, lubricators, and wiping off and cleaning locomotive engine No. 90, on which he was employed, which said work it was his duty to perform:
3 that he found said engine standing at a coal car in said company's car yard in the city of El Paso, Texas, coaling up; that he got on said engine to do the work of cleaning up, &c.: that shortly afterward said engine left the coal car and was run down toward the sand-house in said car yard; that when said engine was so run down toward said sand-house, he had finished the work mentioned excepting the filling up of oil cans; that he remained on the engine and rode down to said sand-house about 300 yards; that he had a right to be on said engine at said time; that said engine was stopping gradually near said sand-house to have fire cleaned out; that as said engine was stopping, and while it was moving very slowly, plaintiff attempted to step off of said engine so as to get out of the way of the fire-cleaner, who was about to enter upon said engine to clean out the fire; that the step leading from said engine and from the cab thereof was in a bad, defective, and improper condition, and was loose so that as plaintiff attempted to step from said engine, said step being in such bad condition turned so that it threw plaintiff under said engine and caused plaintiff to fall, so that his right leg was thrown under said engine and said engine ran over his right leg and it was braised and lacerated, and his right foot

was mashed and it became necessary to amputate his right leg at once, about three inches above the ankle-joint; that in consequence of said injury his right leg was amputated at once, about 3 inches above the ankle-joint and he remained confined to his room about 2 months, and suffered great physical pain and mental anguish, and disquietude and still suffers great physical pain, and mental disquietude.

Plaintiff says that he was in no degree negligent in stepping from said engine while it was moving slowly as hereinbefore stated, and that had said step leading from said engine and cab been in a good, proper and safe condition, he could and would have sustained no injury whatever; that it was the duty of the defendant at the time of said injury to have had and kept said step in a good, safe and proper condition, and that in consequence of the negligence and carelessness of defendant in not keeping said step, and in not having same at said time in a good, safe and proper condition, but in having it and allowing it to be, at said time in a bad, defective and loose condition, he sustained the injuries hereinbefore mentioned. That at said time defendant knew or ought to have known, and could have known by the exercise of reasonable diligence that said step was in such bad, loose and defective condition, and plaintiff did not know and was not chargeable with notice that said step was in such condition.

Plaintiff states that at the time of said accident he was between
33 and 34 years of age; that prior to said accident he was
4 a strong, able-bodied and vigorous man, and his services were reasonably worth, and he could have made $85.00 per month, but in consequence of such injuries he is now a cripple for life, and has been damaged by such injuries in the sum of $20,000.00.

Plaintiff prays that defendant be cited to answer this petition, and he prays that upon final hearing he have judgment for his damages and costs.

MILLARD PATTERSON,
Att'y for Pl'ff.

Indorsed: No. 1766. In dist. ct., El Paso county, Texas. E. M. Patton *vs.* The Texas & Pacific R'y Co. Plaintiff's original petition. Filed this 17th day of March, A. D. 1893. J. A. Escajeda, clerk district court, El Paso Co., Texas.

Citation.

Filed April 3rd, A. D. 1893.

THE STATE OF TEXAS:

To the sheriff or any constable of El Paso county, Greeting:

You are hereby commanded to summon the Texas & Pacific Railway Company, whose local agent in El Paso county is E. Thornton, Jr., to be and appear before the honorable district court of El Paso county, Texas, at the next regular term thereof, to be

holden at the court-house, in the city of El Paso, on the 3rd day of April, A. D. 1893, then and there to answer the plaintiff's petition filed in a suit in said court on the 17th day of March, A. D. 1893, wherein E. M. Patton is plaintiff and said Texas & Pacific Railway Company is defendant, file number of said suit being No. 1766. The nature of the plaintiff's demand is as follows, to wit:

To recover of defendant the sum of $20,000.00 as damages for loss of right leg, and pain and suffering experienced by plaintiff in consequence of bad, defective and loose condition of step of engine No. 90, on the 1st day of December, 1892.

And you will deliver to said defendant in person a true copy of this citation.

Herein fail not, and have you before said court this writ with your indorsement thereon, showing how you have executed the same.

Given under my hand and the seal of said court, at office in
5 El Paso, Texas, this the 17th day of March, A. D. 1893.

[SEAL.] Attest: J. A. ESCAJEDA,
Clerk District Court, El Paso County, Texas.

Sheriff's Return.

Came to hand the 17 day of Mar., A. D. 1893, at 10 o'clock a. m., and executed the 19 day of Mar., A. D. 1893, by delivering to E. Thornton, Jr., the within-named defendant in person, a true copy of this writ.

F. B. SIMMONS,
Sheriff, El Paso Co., Texas,
By T. A. BENDY, *Deputy.*

Fees.

Serving 1 copy $1.50
Mileage .....

Total .....$

Indorsed: File No. 1766. District court, El Paso county, Texas, April term, 1893. E. M. Patton *vs.* The Texas & Pacific Railway Company. Citation. Issued March 17th, 1893. J. A. Escajeda, district clerk. Filed the 3rd day of April, A. D. 1893. J. A. Escajeda, clerk, by M. L. Barlow, deputy.

Petition for Removal.

Filed April 1st, A. D. 1893.

In the District Court of El Paso County, Texas, 34th Judicial District.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

Petition for removal.

The petition of the Texas & Pacific Railway Company, respectfully shows to the court:

First. That the Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to wit: "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construc-
6 tion of its road, and for other purposes," approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby among other things, the name, style and title of said Texas and Pacific Railroad Company was changed to "the Texas and Pacific Railway Company."

Second. That the above-entitled action was commenced in the above-named court on the 17th day of March, 1893, and citation issuing therein was served upon this defendant on the 18th day of March, 1893, which said citation is returnable on the first Monday in April, 1893, it being the 3rd day of April, 1893, and this defendant is not and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition of plaintiff before the 4th day of April, 1893.

Third. That the matter in dispute in this case exceeds exclusive of interest and cost the sum or value of two thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff, against your petitioner, The Texas & Pacific Railway Company, to recover damages in the sum of twenty thousand dollars for injuries alleged to have been received while in the employe of said company in the capacity of fireman on account of defective step to an engine being operated by the said company, which injuries the plaintiff alleges caused him to lose his leg by the negligence of said company as appears from plaintiff's petition, which is referred to for more particular statement of the cause of action. That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in

the construction of its road and for other purposes," and acts amendatory on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above-entitled action is a civil suit arising under the laws of the United States of which the circuit court of the United States for the western district of Texas is given original jurisdiction by act of Congress approved March 3, 1887, to wit: An act entitled "An act to amend the act of Congress, approved March 3, 1875, entitled 'An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes,' and the acts of Congress approved August 13, 1888, entitled "An act to correct the enrollment of an act approved March 3, 1887, entitled 'An act to amend sec-
7 tions 1, 2, 3 and 10, of an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from the State courts and for other purposes,' approved March 3rd, 1875."

Your petitioner herewith presents and files a good and sufficient bond conditioned that it will enter and file in the circuit court of the United States for the western district of Texas, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Your petitioner therefore prays the said court to accept said petition and bond, and to remove this cause to the circuit court of the United States for the western district of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By EDWARDS & NEILL, *Attorneys.*

THE STATE OF TEXAS, }
County of El Paso. }

B. F. Darbyshire, being duly sworn, says that he is the agent of the Texas & Pacific Railway Company, being the general agent of said company; that the said The Texas & Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and knows the contents thereof; that the facts therein stated are true.

B. F. DARBYSHIRE.

Sworn to and subscribed before me, this 1st day of April, 1893.
[SEAL.] J. C. LACKLAND,
Notary Public, El Paso County, Texas.

Indorsed: No. 1766. E. M. Patton *vs.* The Texas and Pacific Railway Co. Petition for removal. Filed the 1st day of April, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas, by M. L. Barlow, deputy.

Bond for Removal.

Filed April 1st, A. D. 1893.

In the District Court of El Paso County, Texas, 34th Judicial District.

8 E. M. PATTON *vs.* TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

Know all men by these presents that The Texas & Pacific Railway Company, as principal, and C. R. Morehead and J. C. Lackland as sureties, are held and firmly bound unto E. M. Patton in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made, unto the said E. M. Patton, his heirs and assigns, we jointly and severally bind ourselves, our successors, representatives, heirs and assigns, firmly by these presents, yet upon these conditions, that,

Whereas, the said The Texas & Pacific Railway Company has filed its petition in the district court of El Paso county, for the removal of a certain cause therein pending, wherein E. M. Patton is plaintiff and The Texas & Pacific Railway Company is defendant, said cause being numbered upon the docket of said court as No. 1766, to the circuit court of the United States for the western district of Texas:

Now, therefore, if the said The Texas & Pacific Railway Company shall enter in said circuit court of the United States for the western district of Texas, a copy of the record in said suit on the first day of next session thereof, and shall pay all costs which may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit, if the same was originally requisite in said cause, then this obligation shall be void; otherwise, of full force and effect.

Witness our hands and seal this 1 day of April, 1893.

THE TEXAS & PACIFIC RAILWAY COMPANY.
By EDWARDS & NEILL, *Att'ys.*
C. R. MOREHEAD.
J. C. LACKLAND.

Approved this 3rd day of April, 1893.

C. N. BUCKLER,
Judge District Court, 34th Judicial District.

Indorsed: No. 1766. E. M. Patton *vs.* The Texas and Pacific Railway Co. Bond for removal. Filed the 1st day of April, A. D. 1893. J. A. Escajeda, clerk district court, El Paso county, Texas, by M. L. Barlow, deputy.

9 *Order of Removal.*

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 1766.

This cause coming on this day to be heard, upon the petition of the Texas and Pacific Railway Company, to remove same to the circuit court of the United States for the western district of Texas, said petition being heard by the court, and it appearing to the court that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said The Texas & Pacific Railway Company is granted and its bond approved, and this cause ordered removed to the circuit court of the United States for the western district of Texas. And the clerk of this court will make out a transcript of the record in this cause, to be filed in the United States court of the said district of Texas.

Bill of Costs.

THE STATE OF TEXAS:

E. M. PATTON, Plaintiff,
vs.
TEX. & PAC. R. R. Co., Defendant. } No. 1766.

Tex. & Pac. R. R. Co. and C. R. Morehead & J. C. Lackland to officers of court, Dr.

Clerk's Fees.

Issuing writ and copy	$1.50
Docketing cause	.20
Filing papers, 3	.45
Entering 1 order	.75
Approving bond	1.50
Taxing costs and cop. thereof	.25
Transcript to Federal court, 40 folios	8.00
Total clerk's costs	$12.65

10 *Sheriff's Fees.*

Executing writ and cop., 1		1.50
Total sheriff's fees	$1.50	
Total clerk's costs	12.65	
Total costs		$14.15

THE STATE OF TEXAS, }
County of El Paso. }

In District Court, El Paso County.

I, J. A. Escajeda, clerk of the district court in and for said county and State, hereby certify the above to be a correct account of the costs in above entitled and numbered suit up to this date.

Witness my hand and seal of said court affixed at office in the city of El Paso, Texas, this the 1st day of May, 1893.

J. A. ESCAJEDA,
Clerk District Court, El Paso Co., Texas,
By M. L. BARLOW, *Deputy.*

Indorsed: May 1st, 1893. Received of defendant fourteen and $\frac{15}{100}$ dollars. J. A. Escajeda, clerk.

THE STATE OF TEXAS, }
County of El Paso. }

I, J. A. Escajeda, clerk of the district court in and for El Paso county, State of Texas, do hereby certify that the foregoing thirteen pages contain a full, true and correct copy and transcript of all papers filed, and proceedings had in the district court of El Paso county, Texas, in the case of "E. M. Patton *vs.* The Texas & Pacific Railway Company," numbered 1766 on the docket of said court.

In testimony whereof, witness my hand and the seal of the district court at office in El Paso, Texas, this 1st day of May, A. D. 1893.

[SEAL.]

J. A. ESCAJEDA,
Clerk District Court, El Paso County, Texas,
By M. L. MARLOW, *Deputy.*

Indorsed: No. 173. Removed from El Paso county.
11 E. M. Patton *vs.* Tex. & Pac. R'y Co. Record from El Paso Co. dist. court. Filed May 1st, 1893. B. G. Duval, clerk, by W. A. Gibbs, deputy.

Plaintiff's First Amended Original Petition.

Filed April 6th, 1898.

In the United States Circuit Court, W. D. T., at El Paso, Texas.

E. M. PATTON }
vs.
THE TEXAS & PACIFIC RAILWAY CO. }

To the honorable U. S. circuit court:

Now comes E. M. Patton, plaintiff in the above-styled cause, and by leave of court first obtained, files this his first amended original petition, in lieu of his original petition heretofore filed and respectfully states:

That the plaintiff is a resident of El Paso county, Texas, and that the defendant, The Texas & Pacific Railway Company, is a corporation duly incorporated, doing business in El Paso county, Texas, and is now and for several years has been engaged in the business of a common carrier in said county operating its line of railway therein, and now has a local agent representing it in said county, and has heretofore filed an answer herein.

That heretofore, to wit: on the first day of December, 1892, the plaintiff was in the employ of defendant as a fireman on one of its locomotive engines; that at about 11.40 a. m. on said date he came in on a regular run, and about 2 o'clock p. m. on said day, after dinner, he started back to do the work of filling up oil cans, lubricators, and to wipe off and clean locomotive engine No. 90 on which he was employed, which said work it was his duty to perform.

That he found said engine standing at a coal car in said company's car yard, in the city of El Paso, Texas, coaling up; that he got on said engine to do the work of cleaning it, etc. That shortly afterward the engine left the coal car and was run down toward the sand-house in said car yard. That when said engine was run down toward said sand-house, he had finished the work mentioned except the filling up of oil cans. That he remained on said engine to ride down to said sand-house, about three hundred yards; that he had a right to be on said engine at said time. That said engine was
12 stopping gradually near said sand-house to have the fire cleaned out, and that as said engine was stopping, and while it was moving very slowly, plaintiff attempted to step off of said engine so as to get out of the way of the fire-cleaner, who was about to enter upon said engine and clean out the fire; that the step leading from said engine and from the cab thereof was in a bad, defective and unsafe condition and was loose, so that as plaintiff attempted to step from said engine, said step being in such a bad and unsafe condition, turned, so that it threw plaintiff under said engine, and caused plaintiff to fall, so that his right leg was thrown under said engine and said engine ran over his right leg and it was bruised and lacerated, and his right foot was mashed, and it became necessary to amputate his right leg at once about three inches above the ankle-joint, and he remained confined to his room about two months and suffered great physical pain, and mental anguish and disquietude, and still suffers great pain and mental disquietude.

Plaintiff says that he was in no degree negligent in stepping from said engine while it was moving slowly, as hereinbefore stated, and that had said step leading from said engine and cab been in a good, proper and safe condition, he could and would have sustained no injury whatever. That it was the duty of defendant at the time of said injury, to have had and kept said step in good, proper and safe condition, and that in consequence of the carelessness of said defendant in not keeping said step, and in not having the same at said time, in a good, safe and proper condition, and in having it and allowing it to be at said time in a bad, defective and loose condition, he sustained the injuries hereinbefore mentioned.

Plaintiff says further that said engine came in on its regular run

on said first day of December, 1892, from the town of Toyah on the line of defendant's railway, which place is about 196 miles easterly from the city of El Paso. That said engine was run from El Paso, Texas, to Toyah, Texas, on the 29th day of November, 1892, and that the engineer running said engine reported at Toyah that certain repairs were needed upon and about the same. That said engine was placed in the round-house of defendant at Toyah and some repairs were made upon the same at said place on the 30th day of November, 1892. That it was the duty of defendant to have had said engine inspected at Toyah, before its return trip to El Paso, Texas, but that before said engine left Toyah on said return trip, arriving in El Paso on the first day of December, 1892, it was not inspected, and through the failure of defendant to inspect the same said step hereinbefore mentioned was left in a bad, defective, unsafe and loose condition, so that the accident hereinbefore described
13 was caused, and the plaintiff was injured as hereinbefore mentioned.

That at the time said accident happened, defendant knew or ought to have known, and could have known by the exercise of reasonable diligence, that said step was in such a bad, loose and defective condition, and plaintiff did not know and was not chargeable with notice that said step was in such a condition.

Plaintiff states that at the time of said accident he was between 33 and 34 years of age; that prior to said accident he was a strong, able bodied and vigorous man, and his services were reasonably worth and he could have made the sum of $85 per month, and in consequence of such injuries he is now a cripple for life, and has been damaged by such injuries in the sum of twenty thousand dollars.

Plaintiff prays, the defendant having answered in this case, that upon final hearing he may have judgment for his damages and costs.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for Plaintiff.

Indorsed: No. 173. E. M. Patton *vs.* The Texas & Pacific Railway Company. Plaintiff's first amended original petition. Filed Ap'l 6th, 1898. D. H. Hart, clerk, by J. P. Hodgson, d'y.

Second Amended Original Answer of Defendant.

Filed April 8th, 1898.

In the United States Circuit Court, Western District of Texas, at El Paso, Texas, April Term, 1898.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendants and having obtained leave of the court files this its second amended original answer amending its answers

filed September 30th, 1893, and October 6th, 1893, and in answer to plaintiff's first amended original petition, filed April 6th, 1898, says:

14 1st. That the matters and things set forth in plaintiff's petition were not sufficient in law to entitle him to have and maintain his action against this defendant, and of this prays judgment of the court.

2nd. And for special exception defendant shows that plaintiff's petition does not allege that it was his duty to be on the engine where and when he alleges he was injured, or show any reason why he was probably on, or had a right to be on or about said engine at said time, and prays judgment.

3rd. For answer herein saving its demurrer defendant denies all and singular the allegations in plaintiff's petition contained and says that it is not guilty of the wrongs, injuries and trespasses therein complained of, and of this it puts itself upon the country.

4th. And for further special exception herein the defendant says that so much of said amended original petition, filed April 6th, 1898, as sets up that it was the duty of the defendant to have its engine inspected at Toyah, Texas, about the 30th day of November, 1892, and that it was not so inspected at said time and place, and the failure to make said inspection caused plaintiff's injuries, and which is an allegation made for the first time in said first amended original petition, filed April 6th, 1898, sets up a new and independent cause of action, which accrued more than one year prior to the filing of said amended petition, and is barred by limitation.

5th. And for further special exception herein defendant says that so much of said first amended original petition, filed April 6, 1898, as sets up that it was the duty of the defendant to have its engine inspected at Toyah, Texas, about the 30th day of November, 1892, and that it was not so inspected at said time and place, and the failure to make such inspection caused plaintiff's injuries, and which is an allegation made for the first time in said first amended original petition, filed April 6th, 1898, sets up a new and independent cause of action, which accrued more than two years prior to the filing of said amended petition, and is barred by limitation.

6th. And for further answer herein defendant admits that plaintiff was a fireman upon one of defendant's engines as stated in his said petition, and that at the time stated in the petition plaintiff's duty was to act as fireman of defendant's engine No. 90, which engine was engaged in hauling passenger trains over defendant's road from El Paso to Toyah, and from Toyah to El Paso. That on the day when plaintiff claims he was injured acting in his capacity as such fireman he was employed by defendant on said engine from

15 Toyah to the city of El Paso, pulling a passenger train and arrived in El Paso about 10.30 a. m. on said day, and a few minutes afterwards left said engine at defendant's depot in said city of El Paso. That it is true that it is part of plaintiff's duty as fireman to have his cans properly filled with oil and a portion of his engine wiped off and clean before said engine should proceed on its next trip from El Paso to Toyah, but that duty of

the plaintiff was not required nor expected to perform until after the engine had been inspected and repaired and placed in the round-house at El Paso. That it would have been plaintiff's duty to have gone out on said engine on the next day, December 2nd, at 2.30 p. m. and ample time and opportunity would have been given him after the said engine had been placed in the round-house and repaired to have performed his duty in relation to the same. That when the engine arrived at El Paso on said day as above stated, and plaintiff left the same at the depot and no longer had any business or connection with said engine until after the same was inspected and repaired. Said engine was taken charge of by the yardmen whose duty it was to take it into the yard and coal it, sand it, repair it and place it in the round-house where the proper servants of the company would clean all that portion of it which was not the duty of the plaintiff to clean and to leave the same in the round-house where plaintiff could clean such parts of it as he was required to clean, and arrange the cans, lubricators and other apparatus which he would need on his next outgoing trip.

That the plaintiff, without authority, or in the line of his duty, voluntarily got upon said engine while the same was in the charge of the yardmen and before the same had been repaired or placed in the round-house, and negligently attempted to get off of said engine while it was in motion, and thereby directly by his negligence contributed to the injuries that he received, wherefore, defendant prays that plaintiff should not recover and of this it puts itself upon the country.

7th. The plaintiff for further plea herein states that engine No. 90 was provided with suitable and proper apparatus to be used as steps to said engine and that defendant employed suitable and competent inspectors whose duty it was to inspect the same, and who did inspect it, and suitable and competent mechanics whose duty it was to repair said engine, and who did repair it when necessary, and that said engine was carefully inspected, but inspection failed to discover the defect, if any there was, in said step, and further that the plaintiff had full opportunity and knowledge of said machinery and apparatus and full opportunity to know whether or not said step was in safe condition, and that if the same was unsafe it became so without fault or negligence on the part of this defendant, and under the circumstances surrounding the plaintiff which gave him equal knowledge of such defect, if any, with the defendant, and that therefore plaintiff should not recover.

For further answer herein defendant says that if the plaintiff received injuries, set forth in his petition and such injuries were caused by any negligence on the part of the employés of defendant that such employés were fellow-servants with the plaintiff and that plaintiff is not entitled to recover of this defendant for such negligence and of this it puts itself upon the country.

8th. Defendant says that that portion of plaintiff's petition charging that defendant's engine was run from El Paso, Texas, to Toyah, Texas, on Nov. 29th, 1892, and arrived at Toyah, Texas,

about the 30th of November, 1892, and that it was the duty of defendant to have had said engine inspected at Toyah, Texas, before its return to El Paso, that it was not inspected, that the failure of defendant to inspect the same was the cause of the accident to plaintiff is a new and independent cause of action set up for the first time in plaintiff's first original petition, filed April 6th, 1898, and that the cause of action in said paragraph alleged accrued more than one year before the filing of said petition, and is barred by limitation.

9th. Defendant says that that portion of plaintiff's petition charging that defendant's engine was run from El Paso, Texas, to Toyah, Texas, on November 29th, 1892, and arrived at Toyah, Texas, about the 30th day of November, 1892, and that it was the duty of defendant to have had said engine inspected at Toyah, Texas, before its return to El Paso, that it was not inspected and that the failure of defendant to inspect the same was the cause of the accident to plaintiff is a new and independent cause of action set up for the first time in plaintiff's first original petition, filed April 6th, 1898, and that the cause of action in said paragraph alleged accrued more than two years before the filing of said petition, and is barred by limitation.

EDWARDS & EDWARDS,
Attorneys for Defendant.

Indorsed: No. 173. E. M. Patton *vs.* The Texas & Pacific Railway Company. Second amended original answer of defendant. Filed Ap'l 8, 1898. D. H. Hart, clerk, by J. P. Hodgson, deputy.

17 *Judgment.*

Entered April 8th, A. D. 1898.

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

APRIL 8TH, A. D. 1898.

On this the 8th day of April, A. D. 1898, came on for trial this cause, and both parties announced ready for trial, and the defendant presented the demurrers contained in the second, third and fourth paragraphs of its second amended original answer filed April 8th, 1898, and the same having been considered by the court it is the opinion of the court that said exceptions are not well taken, and the same are hereby overruled, to which ruling of the court, the defendant then and there excepted.

Then came a jury of twelve good and lawful men, to wit: M. T. Chastain and eleven others, who having been duly sworn, and after hearing the evidence and argument of counsel, received the charge of the court and returned the following verdict:

"We, the jury, find for the defendant, The Texas & Pacific Railway Co.

M. T. CHASTAIN, *Foreman.*"

Which verdict is approved by the court.

It is therefore considered by the court that the plaintiff, E. M. Patton, take nothing by reason of his suit herein, and that the defendant, The Texas & Pacific Railway Company, go hence without day and recover of the plaintiff, E. M. Patton, all its costs in this behalf expended, for which let execution issue.

Motion for a New Trial.

Filed April 9th, 1898.

In the Circuit Court of the United States, at El Paso, April Term, 1898.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Now comes the plaintiff by his attorneys and moves the
18 court to set aside the verdict of the jury, the judgment of the court and grant him a new trial in this cause, because:

First. The court erred in charging the jury to find a verdict in favor of the defendant.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for the Plaintiff, E. M. Patton.

Indorsed: No. 173. E. M. Patton *vs.* Texas & Pacific Railway Co. Motion for a new trial. Filed Ap'l 9th, 1898. D. H. Hart, clerk, by J. P. Hodgson, d'y.

Order Overruling Motion for New Trial.

Entered April 12th, 1898.

In the Circuit Court of the United States for the Western District of Texas, at El Paso.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

APRIL 12TH, A. D. 1898.

On this the 12th day of April, 1898, came on to be heard the motion of plaintiff in the above styled and numbered cause for a new trial, and the court being fully advised, doth overrule the same.

Plaintiff's Bill of Exceptions.

Filed April 12th, 1898.

In the U. S. Cir. Ct., W. D. T., at El Paso, Texas.

E. M. PATTON
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Be it remembered that upon the trial of the above-entitled cause the following evidence was introduced, to wit:

Plaintiff, E. M. Patton, was in the employ of the defendant as a fireman at the time and some time before the accident men-
19 tioned in his petition; his regular work was as fireman of engine No. 90, which hauled a passenger train from the city of El Paso to Toyah, Texas, a distance of 196 miles, leaving El Paso about 2.30 p. m. and arriving at Toyah about 11.30 p. m. and remaining in Toyah the balance of the night and the next day until about 2 a. m., the morning of the second day, when the engine would return from Toyah to El Paso hauling a passenger train, arriving in El Paso about 10.30 a. m. on the same day, and again leaving El Paso for Toyah at 2.30 p. m. the next day; the engineer who ran said engine was named A. Stiner.

Second. It was the duty of the fireman of passenger engines in the employ of defendant, to keep the cab of the engine clean, and to clean all that portion of the engine above the running board—a board extending from one side of the engine to the center of the boiler, and to keep the oil cans and lubricators filled with oil, and to generally obey the orders of the engineer when the train was running.

Third. That the defendant had at El Paso a round-house and repairing shops and a machinist to inspect and repair the engines, and also had at Toyah a round-house and a machinist to inspect and repair its engines.

Fourth. When the defendant's passenger engines arrived at El Paso (including the engine upon which plaintiff worked) the engineer and fireman would get off, and leave the engine attached to the train at the depot, and the engine would be taken charge of by the yardmen and an employé called the "hostler" would detach the engine from the train and take the same down into the yard, to coal it, sand it, and do such other things as were necessary, except repairing it, and then place the same in the round-house where it would be cleaned by the servants other than the fireman in all its parts, beneath the running board, and inspected by the machinist and repaired, and that the fireman would have ample time after the engine was placed in the round-house, to clean out the cab, wipe off his part of the engine, fill his oil cans and lubricators, and then the engine would be taken from the round-house and attached to the train by the yardmen or hostler, where the fireman and engi-

neer would get on the train again to begin their trip, and plaintiff knew all this.

Fifth. There was no rule of the company that prohibited the fireman from getting on the engine for the purpose of filling his oil cans before it was placed in the round-house, nor was there any rule that specified a particular time when he should do this work. The only rule being that he was to have his engine in proper condition to go out when its turn came. He could not be called for duty until eight hours after he came in under the rule. That the fireman could select any time that was most convenient to him to clean the cab, fill the oil cans, etc., and that while the engine was hot and the oil warm it was more convenient and could be done in less time than to wait until the engine was cooled off.

Sixth. Passenger engine No. 90, on which the plaintiff was employed, has two steps on the right side; one of these steps is a loop fastened under the tender, and a person getting off the engine backwards would have this step on his left; the other step, which would be on his right side, was attached to the rear part of the engine, and it is this latter step the proof shows was loose. The gangway of the engine is where the tender and engine come together and there is an opening on each side of the engine; that these steps were used to get on and off the engine; the step which is claimed in this case to be defective is the step which is attached to the engine. This step consists of a shovel-shaped piece of iron standing directly out from the engine firmly fixed to a rod of iron about an inch in diameter and about eighteen inches long, which rod passes up through the iron casting at the rear of the engine, about six or eight inches thick; a shoulder to this rod fits underneath the casting, and the part passing through above has threads on the upper end upon which the nut is screwed firmly down on the casting, fastening the rod in the casting so that it will not move. This nut is about two inches square, and the thread on the nut extends five or six inches, thus making the rod extend above the nut, when the nut is properly screwed down, and covering this extension above the nut is a tubular piece of brass arranged for ornament which sets upon the nut and hides from view that portion of the nut immediately around the threads of the step bar. The step affixed to this bar is about twelve or fourteen inches above the track, and the one affixed to the tender is about six inches higher.

Seventh. On the 29th day of November, 1892, it was necessary to put a spring on the right side of the engine, and in order to do this, this step had to be removed in order to place a jack-screw under the rear of the engine, and in doing this the rod holding the step was taken out of the casting by unscrewing the nut described above, and the step was replaced on that morning at El Paso before the engine started on its run to Toyah. In replacing the step the plaintiff Patton himself, assisted the machinist of defendant at El Paso, Mr. Rossiter, in tightening up said nut, and on said day the engine left El Paso taking out a passenger train at the usual hour, 2.30 p. m. and made the run to Toyah. The machinist (Rossiter), and the plaintiff, testified that the nut was properly screwed on at El Paso

and would not have become loose in a trip from El Paso to Toyah and return.

Eighth. That at Toyah some repairs were made on the en-
21 gine. The plaintiff, with engine No. 90, and the train to which it was attached, left El Paso, Texas, for Toyah, on the 29th day of November, 1892, which was Saturday, and arrived in Toyah on the night of November 29, 1892, at 11.30 p. m. That when the train reached Toyah the engineer, Mr. Stiner, reported that repairs were necessary on his engine. That the report of the engineer in the book at Toyah, provided for that purpose, shows that the following repairs were to be made: "Change water; grind in blower; put gasket in front joint of blow-pipe; raise the pilot." That "change water" means to let the water out of the engine and put fresh water in. "Grind in blower" is to arrange the blower so that the smoke will pass out at the stack instead of coming out at the cab, and that "grind in blower" and "put gasket in front joint of blower pipe" are light and small jobs. That "to raise the pilot" required the engine to be jacked up and that gibs be put under the spring end of the engine truck; the engine truck is near the front end of the engine. The engine left Toyah at the usual hour of 2 a. m. on the morning of the first of December, 1892, and arrived at the usual hour at El Paso, 10.30 a. m. After they arrived in El Paso, E. M. Patton, the plaintiff, and the engineer, Mr. Stiner, both left the engine attached to the train at the depot, got off the engine on the right side, using the step mentioned in the evidence and went to their homes, and neither noticed anything wrong with the step. A short time after the engine arrived in El Paso, the "hostler" or man whose duty it is to take it, coal it, etc., and put it in the round-house, took charge of it, detached it from the train, ran it into the yard and set it on a transfer track, and left it there an hour or so, then took it to the coal cars and left it there for the coal-heavers to coal up, and it remained there an hour or more. The coal is placed in the tender back of the engine and piled up pretty high, and some of the pieces are a foot or eighteen inches long, and six or eight inches wide and very heavy, and one of them falling off the gangway might strike the step. When the hostler went later to get the engine from the coal yard the plaintiff was on the engine; the hostler ran the engine from where it was coaled, and was moving it to the proper position near the sand-house to have the fire cleaned out; it was something near an hour from the time the hostler started to leave the coal yards before he got to the sand-house, as he was detained by switches being closed. The plaintiff was on the engine during this time cleaning up and filling his cans and lubricators while the engine was nearing the place where the fire would be cleaned out and two fire-cleaners were on the engine also, one of them in the gangway and the other on the front of the engine; the engine was backing and the fire-cleaner on the engine was
22 in the act of showing the hostler by making a signal where to stop the engine and to clean out the fire. The engine at this time was moving very slowly; not more than three or four miles an hour, and the plaintiff had gotten off the gangway and

was standing on the steps, with his face to the engine and his left foot on the tender, and his right foot on the step which is heretofore described as attached by a rod to the rear of the engine, and the plaintiff desiring to get out of the way of the fire-cleaners, as the engine passed the sand-house, and for the purpose of stopping there and waiting until the fire was cleaned out, stepped off the engine in a careful and proper manner, that is, by detaching his left hand and foot, and stepping down with his left foot, which was in the direction the engine was backing; the pressure of his right foot turned the rod to which the step was attached in such a manner as to throw the step around close to the rear driving wheel of the engine, and plaintiff's right foot slipped off the step, so that his right foot fell immediately under the driving wheel, and the engine continuing to back the wheel passed over his right foot and crushed it so that amputation became necessary.

9th. Plaintiff knew that there were servants and employees of the defendant for the purpose of inspecting and repairing his engine and that the opportunity given to do this was when the engine was placed in the round-house at El Paso, and that at the time he fell and was injured the engine was not yet placed in the round-house where it would be inspected and repaired.

The cause of the turning of the step when plaintiff fell, was on account of the nut, heretofore described, on the top of the casting, not being taut, but it was loose, leaving the rod to which the step was attached so it could be easily turned.

It is the duty of the engineer who operates the engine to inspect and report all defects and repairs necessary on his engine in a book kept for that purpose at each place at the end of his run, in this instance in El Paso, and at Toyah, and on the day plaintiff was injured, the engineer entered the following report at El Paso a few minutes after they arrived, "Pilot-raising and wash out engine," that is, the pilot needed raising, and the engine was to be washed out, and he did not discover or report that the said step was loose, if it was loose at the time.

That the defendant had proper and competent inspectors to inspect and repair engines in the yards at El Paso and Toyah in addition to the inspections made by the engineers, and at the time plaintiff was hurt the yard inspectors and mechanics at El Paso had had no opportunity under the routine and customs as to handling,
coaling, sanding, cleaning, inspecting and repairing engines
23 as they arrived in the yards, to inspect or repair the engine
upon which he was injured at El Paso, and this plaintiff well knew.

Plaintiff's business in November and December, 1892, was fireman on a locomotive engine, and he had been engaged in said business about seven years, and was earning from eighty to eighty-four dollars a month. That he was thirty-four years of age and would probably live thirty-two years longer; he was in good health at the time of the accident, and had not missed a day's work for two or three years, and on account of losing his leg by being run over by defendant's engine he was not in a condition to follow his

business any more; and that he suffered great physical pain from the injury and was confined to his room for something like two months and was attended by a skillful physician and surgeon furnished by defendant.

10th. Plaintiff did not know that the said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured; that the manner in which the plaintiff got off the engine backward was a careful and prudent manner and that he alighted in a careful and prudent manner and in the usual manner in alighting from an engine, whether in motion or standing still, and that if said step had been in repair there was no danger in the manner in which plaintiff alighted from the engine.

Plaintiff testified that it was the custom of the fireman to go on their engines in the yards before they were put in the round-house, and do their work of cleaning such parts of the engine as it was their duty to clean, and cleaning out and filling the lubricators and filling the oil cans; that on being asked he could not mention the name of any other fireman employed on defendant's passenger engines who did this besides himself. He stated that his reason for doing this work on the engine at that time was that the weather was getting cool and he had to strain his oil, and he would set his cans out in the gangway near the engine so that the warmth would make it easier and quicker work to handle the oil properly, whereas, if he had waited until the engine was in the round-house the oil would have been somewhat chilled and more difficult to handle, and that for some time previous he had been going on the engine and doing this work while the engine was in the yard, and before it had been placed in the round-house.

Mr. Wheeler, who was superintendent of terminals and foreman of the shops in El Paso for defendant, the hostler Taylor, and the machinist Rossiter, employees in the defendant's yards and shops at El Paso, testified that plaintiff was the only fireman of a passenger engine that went upon his engine in the yard in El Paso to do his work before his engine had been placed in the
24 round-house, and that they had known him to do so three or four times before the accident.

All the witnesses, except A. C. Wheeler, superintendant and foreman of defendant, testified that the nut above described used to tighten the step would not work loose in making the trip from El Paso to Toyah and back by the ordinary jar and running of the engine; that it might come loose by the step having struck against something.

Wheeler testified that he was a competent machinist, having had an experience of twenty years with engines; that the nut might work loose on said trip but it was impossible to tell whether it would or not. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. It was proven that the nut and threads of the step-rod were in good condition, and had not worked loose since the accident to plaintiff.

11th. E. M. Patton, the plaintiff, testified for himself as follows:

Engine No. 90, on which I was employed as fireman, arrived at Toyah at 30 minutes after 11 on Saturday, November 29, 1892. We remained in the town of Toyah all day Sunday. Alexander Mitchell was the foreman of the round-house at Toyah and Mr. Young was the defendant's machinist there. I had had at that time about twelve years' experience as fireman and assistant foreman of round-house. I know what the duties of the foreman of the round-house at Toyah were. It was the duty of the foreman there to see that the work reported to be done by the engineer was done on the engines, and it was also his duty to report all material used in the round-house there and to keep the men's time, etc. As I have said, Mr. Young was the machinist there. His duty was to do the repairing of the engines that was reported there. It was his duty to do the work on the engine and see that it was done in a proper manner. I did not see Mr. Young, the machinist, around there on that day. I was around the round-house there the most of that day, Sunday. Jack-screws were placed around the engine while I was there There was a jack-screw placed on the right side close to this step. The pilot could not be raised without raising that corner of the engine where this step was fixed. I had my work to do on the engine at Toyah, and I remember getting off of it late in the afternoon of the Sunday mentioned, and when I got off of it on the right side after I did my work there I saw the jack-screws sitting about the engine. This was about the time I left the round-house and went to supper. It is the machinist's business to make the repairs on the engine called for by the engineer's report. I do not think that I used this step in getting off the engine on the way from Toyah back to El Paso. After we arrived at El Paso we got off on the right side. I don't remember whether I used the step.

25 The engine was standing still when we got off at El Paso. In stepping from the engine with the engine standing still a man might step right off. There was a loop step on the tender, and the step on the engine. A man might step off by putting his left foot on the loop and never touch the step at all. A great many times I will step on the ground while the engine is standing and never touch the step. I don't know of any occasion I would have for using this step at all on the way from Toyah to El Paso, nor any occasion we would have for getting off the engine on the right side coming from Toyah here. It was my custom to get off the engine once coming from Toyah to El Paso. That was at Sierra Blanca, where I got off for breakfast, and then I got off on the left side of the engine.

12th. A. Stiner, a witness in behalf of defendant, testified: I was the engineer in charge of engine No. 90 at the time plaintiff Patton was hurt, and was the engineer running that engine for some time before. Alexander Mitchell was a competent man to inspect engines. His employment at the time the accident happened was that of foreman at Toyah. The machinist at Toyah was a man named Young. There was no special inspector or repairer at Toyah at that time any more than the foreman and machinist. It

was the duty of anybody who was controlling the engine to see if anything was wrong. The machinist should do the work of grinding in the blower. The Chinamen did the work of putting in the gasket and changing water. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. When the engine went into Toyah, it was my duty as engineer to report defects in the engine and repairs to be made. It was my duty to examine the engine again before it left Toyah and see whether or not the repairs called for had been made, and there was no other inspection upon my part to be made at Toyah before we left there.

The witness Stiner was asked the following questions:

Q. "The attorney for the plaintiff has asked you the question whether it was not a part of the duty of the foreman or machinist not simply to do the repairs pointed out, but to inspect the engine itself generally and see whether it was in good condition?

A. Yes, sir; it was their duty to look around.

Q. If the engineer overlooks anything they might find it?

A. There is times an engineer overlooks something; they might find it.

Q. It is their business to look for it?

A. O, yes; it is their business to look.

Q. Do you know as a matter of fact whether the step was loose when the engine left Toyah?

A. No, sir.

26 Q. Did you examine the step at Toyah?

A. I don't know as I examined it; I got off and on.

Q. Did you examine the step to find out whether or not it was loose?

A. No, sir; I did not pull on it or anything like that.

Q. You don't know whether it was loose when it left Toyah or not?

A. It was not loose when I got on it. The step was not loose when I got on it.

Q. Did you examine it to see whether or not it was loose?

A. I examined it with my foot."

Down at Toyah I simply put my foot on the step and got up on the engine. I don't remember the run exactly now. I used the step at the San Martine tank, or at Prairie, and Van Horn; then again at Blanco and at Hancock, and whether I used it again between Hancock and El Paso I can't remember.

He also testified that the step was not loose when the engine left Toyah; that he examined it with his foot, and explained that he ascertained that it was not loose because he got up on the engine using this step several times as stated above between Toyah and El Paso, and while one might get down from the engine and not discover it, that in mounting the engine after oiling, he came from front of the engine and grabbed the hand-hold, put his left foot on this step and swung his body round to place the right foot in the loop on the tender.

13th. Alexander Mitchell being called as a witness for defendant testified as follows: On the 29th and 30th days of November, 1892, I was the round-house foreman of the Texas and Pacific Railway Company, at Toyah; the company had a machinist at Toyah at that time; he was not at the round-house on Sunday; his name was Charley Young. When he was not there it was my duty to do the work, to a certain extent—little jobs. I remember the engine No. 90 on which the plaintiff Patton was employed, coming in. The attorney for the defendant here called the witnesse's attention to the report made by the engineer when the engine reached Toyah on the night of November 29th, viz: "Change water, grind in blower, put gasket in front of blower pipe, and raise pilot also." The witness was asked the following questions:

"Q. What did you do to that engine?
A. I raised the engine in front without raising the pilot.
Q. I mean, did you make the other repairs?
A. No, sir; I did not.
Q. The small repairs?
A. No, sir; I did not.
Q. State what you did.
27 A. I put some clips or gibs under the springs to raise the pilot up.
Q. Did you complete the job?
A. I did.
Q. Did you do anything with the part of the engine near the engine step on the right side?
A. In order to do that I had the step off and jacks under it.
Q. On the right side of the engine?
A. Under that side to hold her up; I had to jack the front end up in order to do the work, and hold the back end up off the springs.
Q. That is what you did?
A. Yes.
Q. Did you have anything to do with the step?
A. I had it off.
Q. Did you put it back there?
A. Yes, sir.
Q. Did you put it back properly?
A. Yes, sir; I had men working with me to do it.
Q. Did you see it done?
A. I seen it being done; I went into the office and came out again.
Q. Did you examine the nut to see if it was put on right or not?
A. The nut was screwed up tight.
Q. The step was screwed up tight?
A. Yes, sir; I am sure it was screwed up tight; it made 200 miles.
Q. What was the condition of the engine—was that step in good condition when it left Toyah?
A. It left in the morning.
Q. When you got through with it?
A. When I left the round-house the engine was all right."

Cross-examination:

(Q.) "Did you put that jack-screw under the end of the engine?
A. I had it put under.
Q. You did?
A. Yes, sir.
Q. Did you take the step off?
A. I had to have it taken off.
Q. You saw it taken off?
A. Yes, sir.
28 Q. You could not take the step off without moving that nut at the top?
A. No, I would have to take that off to take the step off.
Q. Did you raise the pilot or not?
A. I raised the front end of the engine and of course that raised the pilot.
Q. That is the way you raised it?
A. That is the way I raised it.
Q. Were you there during the whole time the work was being done about the engine?
A. I think I was all the time that the work was being done on the engine in and about the office and about the round-house."

The witness Mitchell also testified that he had the step put back after taking out the jack-screw, and that the nut was screwed back properly, and that the nut was tight when the engine left the round-house at Toyah.

The witness Mitchell was here asked (by counsel for plaintiff) if he did not testify on the former trial of this case, in October, 1893, that the step was not moved for the purpose of putting the jack-screws under the end of the engine, and that the nut on the step was not moved while the engine was at Toyah on the trip mentioned, and that Mr. Young was a machinist at Toyah at that time. That it was Sunday the 30th day of November, 1892, and he, Mitchell, believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher. The witness replied that he had no recollection of so testifying.

He was then asked if he did not testify on the former trial of this case that the step mentioned in the evidence which turned with the plaintiff Patton was not moved at all while the engine was at Toyah on the 30th day of November, 1892, and if he did not testify that the nut by which this step was fastened was not moved at all on that trip. He said he had no recollection of so testifying. The witness was then asked the following questions:

"Q. Did you put the gasket in the pipe?
A. I did not.
Q. Did you grind the blower?

A. No, sir; I did not.
Q. Why did you put the jack-screw under that end of the engine?
A. I could not raise the engine and fix the engine without doing it.
29 Q. You could not do what you did about the pilot unless you raised the engine?
A. Unless I held the back part of the engine up.
Q. So, in doing what you did about the pilot, and in raising the pilot as you did raise it, you put these jack-screws under the end of the engine where the step was?
A. I had it done; I was there to see it was done.
Q. Were you a machinist then, Mr. Mitchell?
A. No, sir; I ain't no machinist; that is, I never learned the trade.
Q. That was a machinist's work you were trying to do, wasn't it?
A. Well, yes, it was a machinist's work, although I can do it."

The witness was here asked if he did not testify on the former trial in October, 1893, that to grind in the blower was a small job and that he did it; and that to put gasket in front joint of blower pipe was a very light job and he did it. He answered by saying that he had no recollection of so testifying.

14th. The plaintiff then introduced in evidence the stenographic report of the testimony of Alexander Mitchell, taken upon the trial of this cause at the October term, 1893, of this court, by George R. Harvey, official stenographer, it being admitted that said stenographic report is a true and correct statement of the testimony of said witness, and by the same it was proven that said witness, Alexander Mitchell, on the former trial of this cause, at the October term, 1893, testified as follows:

"That he told the Chinamen to get the jack-screws, and under his direction they placed two jack-screws, one on each side of the front of the engine, and that without any instructions from him they brought and put another jack-screw on the ground near the step. That he was out of the round-house five or ten minutes while the Chinamen were there, and that this jack-screw near the step was not placed under the engine in a position to elevate it, and that the step was not moved for the purpose of putting the jack-screws there, and that the nut on the step was not moved while the engine was at Toyah on that trip. That Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th day of November, 1892, and that he, Mitchell, believing that he was competent to do so undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher. That to grind in the blower was a small job, and the witness
30 did this. That to put gasket in front joint of blower pipe was a very light job, and that this work was also done by the witness. That to raise the pilot required the witness to jack up

the engine and put gibs under the spring ends of the engine truck; the engine truck is near the front end of the engine; that the witness did not do this because it was a pretty big job, and he was doing the work by himself with the help of only two Chinamen; that the engine was all right and ran as well as if it had been done, except the pilot was a little low."

15th. The above and foregoing being all the facts, and all of the evidence introduced, counsel for defendant requested the court to instruct the jury to return a verdict for the defendant, "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of the defendant," which said instruction was given to the jury by the trial court, to which action of the court the plaintiff thereupon before the jury retired in open court excepted, (and now tenders his bill of exceptions) and insisted that the court should submit the cause to the jury upon the question of negligence raised by the pleadings and the evidence, and thereupon the jury returned the verdict which is copied in the judgment in this case, and thereupon the court rendered judgment against the plaintiff; and thereafter the plaintiff moved the court on the grounds stated in his motion for a new trial, contained in this record, to set aside said judgment, and the said motion was overruled, and the plaintiff now tenders this his bill of exceptions and asks that the same be allowed by the court, and filed as a part of the record in this cause, and the same is done accordingly.

Signed this 12th day of April, 1898.

T. S. MAXEY, *Judge.*

Indorsed: No. 173. In U. S. cir. ct., W. D. T., at El Paso, Texas. E. M. Patton *vs.* The Tex. & Pac. R'y Co. Plaintiff's bill of exceptions. Filed April 12, 1898. D. H. Hart, clerk.

31 *Assignment of Error.*

Filed April 13th, 1898.

In the United States Circuit Court, W. D. T., at El Paso.

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 173.

Assignment of error.

Now comes E. M. Patton, the plaintiff in the above-styled cause by his counsel, and says that in the record and proceedings in the above cause there was manifest error in this:

The trial court erred, to the prejudice of plaintiff, in instructing the jury as follows: "'To return a verdict for the defendant, because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of defendant.' Said instruction was erroneous, as the evidence in the case tended

strongly to show that the injury of which the plaintiff complains was the direct result of negligence on the part of the defendant for which it is legally liable, and presented an issue of fact which should have been submitted to the jury. The evidence upon this trial was materially different from the evidence upon the former trial of the case, and the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of defendant's employees at Toyah in leaving the step attached to the engine in a loose and unsafe condition. That said employees were charged with the duty imposed by law upon the defendant of inspecting the engine and keeping the various parts of and about the same in a reasonably safe and good condition, and that they negligently failed to perform such duty.

The evidence tends strongly to show that the step which turned with the plaintiff and caused the injuries he received through its being loose, was in a loose condition when the engine on which plaintiff was employed left Toyah, and that the engine was not inspected by defendant's machinist at Toyah, and that after repairs were made upon the engine at Toyah, the step was negligently left in a loose and unsafe condition.

Wherefore the plaintiff, E. M. Patton, prays that the judgment rendered against him by the United States circuit court for the western district of Texas, at El Paso, be reversed, and the cause remanded for a new trial.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for the Plaintiff, E. M. Patton.

Indorsed: No. 173. E. M. Patton *vs.* The Tex. & Pac. R'y Co.
Assignments of error. Filed April 13, 1898. D. H. Hart, clerk.

32 *Writ of Error.*

Allowed and filed April 13th, 1898.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between E. M. Patton, plaintiff, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said E. M. Patton as by h[illegible] complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the

fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

[SEAL.]

D. H. HART,
Clerk of the United States Circuit Court,
Western District of Texas.

Allowed this, the 13th day of April, 1898.

T. S. MAXEY,
United States Judge.

(Indorsement:) No. 173. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company, defendant in error. Writ of error. Filed April 13, 1898. D. H. Hart, clerk.

33 *Writ of Error Bond.*

Filed April 13th, 1898.

Know all men by these presents that we, E. M. Patton, as principal, and Fred Schaefer, A. K. Albers, as sureties are held and firmly bound unto The Texas & Pacific Railway Company in the full and just sum of five hundred dollars, to be paid to the said Texas & Pacific Railway Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a term of the circuit court of the United States for the western district of Texas, at El Paso, in a suit depending in said court, between E. M. Patton, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 173 on the docket of said court, a judgment was rendered against the said E. M. Patton on the — day of April, 1898, that the said E. M. Patton take nothing by his suit and the defendant, The Texas & Pacific Railway Company, go hence without a day and recover of the plaintiff, E. M. Patton, all costs by it expended, and the said E. M. Patton having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Texas & Pacific Railway Company and its attorneys of record, citing and admonishing it to be and appear before the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said E. M. Patton shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

E. M. PATTON, [SEAL.]
By MILLARD PATTERSON,
His Agent and Att'y.
FRED SCHAEFER. [SEAL.]
A. K. ALBERS. [SEAL.]

Approved this the 13th day of April, 1898.

T. S. MAXEY,
United States Judge.

34 Indorsed: No. 173. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Co., defendant in error. Bond. Filed April 13, 1898. D. H. Hart, clerk.

Citation in Error.

Filed April 13th, 1898.

THE UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

The President of the United States to The Texas & Pacific Railway Company, defendant in error, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals, for the fifth circuit at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the clerk's office of the circuit court of the United States for the western district of Texas at El Paso, in the cause wherein E. M. Patton is plaintiff in error, and The Texas & Pacific Railway Company is defendant in error, to show cause, if any there be, why the judgment rendered against the said E. M. Patton, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day o April, in the y ar of our Lord one thousand eight hundred and ninety-eight.

Signed this, the 13th day of April, 1898.

[SEAL.]

T. S. MAXEY,
United States Judge.

Attest: D. H. HART, *Clerk.*

Indorsed: No. 173. E. M. Patton, pl'ff in error, *vs.* The Texas & Pacific Railway Co., def't in error. Citation. We acknowledge service of the foregoing citation this the 13th day of April, 1898, at

El Paso, Texas. Edwards & Edwards, att'ys for The Texas & Pacific Railway Company, defendant in error. Filed April 13th, 1898. D. H. Hart, clerk.

35 *Clerk's Certificate.*

The United States of America, Western District of Texas, at El Paso.

I, D. H. Hart, clerk of the circuit court of the United States for the western district of Texas, do hereby certify, that the foregoing (38) thirty-eight pages contain a true and correct copy of the proceedings had in cause No. 173, entitled E. M. Patton *vs.* Texas & Pacific Railway Company, as the same appears on file and of record in this office. And I further certify that the original writ of error is included in said transcript.

Witness my hand and the seal of said court, at office in the city of El Paso, Texas, this the 20th day of April, A. D. 1898.

[SEAL.] D. H. HART,
Clerk of said Circuit Court.

36 United States Circuit Court of Appeals, Fifth Circuit,
November Term, 1898.

JANUARY 9TH, 1899.

(Extract from Minutes.)

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 724.

This cause was regularly called this day and submitted to the court, after argument, by Mr. C. N. Buckler, for plaintiff in error, and by Mr. T. J. Freeman, for defendant in error.

November Term, 1898.

MARCH 21ST, 1899.

(Extract from Minutes.)

E. M. PATTON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 724.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further adjudged that the plaintiff in error, E. M. Patton, and the sureties on the writ of error bond herein, Fred Schaefer and A. K. Albers, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

37 *Assignments of Error.*

United States Circuit Court of Appeals, Fifth Circuit.

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Now, on this the — of July, 1899, comes E. M. Patton, by his attorneys, and says that in the record and proceedings in the above-entitled action in the United States circuit court of appeals for the fifth circuit there is manifest error in this, to wit:

First.

Said United States circuit court of appeals for the fifth circuit erred in refusing to sustain the first assignment of error urged by the plaintiff in error and in refusing to hold that the trial court erred, to the prejudice of plaintiff, in instructing the jury as follows: "To return a verdict for the defendant because there is not sufficient testimony to entitle the plaintiff to recover and no evidence showing any negligence on the part of defendant." Said instruction was erroneous, as the evidence in the case tended strongly to show that the injury of which the plaintiff complains was the direct result of negligence on the part of defendant, for which it is legally liable, and presented an issue of fact which should have been submitted to the jury. The evidence upon this trial was materially different from the evidence upon the former trial of this case, and the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of defendant's employees at Toyah in leaving the step attached to the engine in a loose and unsafe condition; that said employees were charged with the duty imposed by law upon the defendant of inspecting the engine and keeping the various parts of and about the same in a reason-
38 ably safe and good condition, and that they negligently failed to perform such duty.

Second.

The evidence upon the trial tended strongly to show that the step which turned with the plaintiff and caused the injuries which he received through its being loose was in a loose condition when the engine on which the plaintiff was employed left Toyah, and that the engine was not inspected by the defendant's machinist at Toyah, and after repairs were made upon the engine at Toyah the step was negligently left in a loose and unsafe condition.

Wherefore the plaintiff in error, E. M. Patton, prays that the judgment of said circuit court of appeals for the fifth circuit be reversed and that said cause be remanded to the United States circuit court

for the western district of Texas for trial, and prays for all such orders in the premises as may be just and proper.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for E. M. Patton, Plaintiff in Error.

Endorsed: Filed July 26, 1899. J. M. McKee, clerk.

Petition for Writ of Error.

United States Circuit Court of Appeals, Fifth Circuit.

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, or any associate justice of the Supreme Court of the United States:

Now comes E. M. Patton, by his attorneys, and complains
39 that in the record of proceedings and also in the rendition of the judgment of the United States circuit court of appeals for the fifth circuit in the above styled and numbered cause, on the — day of March, 1899, affirming the judgment of the United States circuit court for the western district of Texas in said cause, manifest error hath intervened, to the great damage of E. M. Patton.

Your petitioner would state that the circuit court of the United States for the western district of Texas, where this suit was originally tried, obtained jurisdiction, and jurisdiction depended upon the fact that The Texas and Pacific Railway Company, the defendants therein, was a corporation created by an act of Congress; that the matter in controversy herein exceeds five thousand dollars, besides costs.

Wherefore he prays for allowance of a writ of error, to the end that this cause and the said judgment may be carried to the Supreme Court of the United States for review, and prays for supersedeas of said judgment, and such other process as may cause the same to be corrected in said Supreme Court.

MILLARD PATTERSON,
C. N. BUCKLER,
Attorneys for E. M. Patton.

Writ of error allowed and bond fixed at one thousand dollars this 13th day of July, 1899.

E. D. WHITE,
Associate Justice Supreme Court of the United States.

Endorsed: Filed July 26, 1899. J. M. McKee, clerk.

Writ of Error Bond.

United States Circuit Court of Appeals, Fifth Circuit.

40 E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Know all men by these presents that we, E. M. Patton, as principle, and Horace B. Stevens and Fred Shaefer, as sureties, of the city of El Paso, State of Texas, *and* held and firmly bound unto The Texas and Pacific Railway Company in the full and just sum of one thousand dollars, to be paid to the said Texas and Pacific Railway Company, its certain attorneys, successors, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this — day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a regular term of the United States court in and for the western district of Texas, sitting at El Paso, at the April term, 1898, in a suit pending in said court between E. M. Patton, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the plaintiff that he take nothing by his suit, and that said defendant go hence without day and recover its costs of plaintiff, etc.;

And whereas the said E. M. Patton duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which said court, on the — day of March, 1899, rendered a judgment affirming the said judgment of the United States circuit court in all particulars;

And whereas the said E. M. Patton has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation, directed to the said Texas and Pacific Railway Company, citing and admonishing it to be and appear at said Supreme Court, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said E. M. Patton shall prosecute his writ of error and answer
41 all damages and costs if he fail to make his plea good, than the above obligation to be void; otherwise to remain in full force and virtue.

E. M. PATTON.
HORACE B. STEVENS.
FRED SHAEFER.

The foregoing bond approved.
E. D. WHITE,
Associate Justice Supreme Court United States.

THE STATE OF TEXAS, }
County of El Paso. }

Before me, the undersigned authority, on this day personally appeared Horace B. Stevens and Fred Shaefer, who each deposes and says that he resides in the city of El Paso, Texas, and that, all his debts and liabilities being paid, he is well worth the sum of one thousand dollars in property situated in the city of El Paso, Texas, subject and liable to seizure and for the satisfaction of any judgment that may be rendered against him.

HORACE B. STEVENS.
FRED SHAEFER.

Sworn to and subscribed before me this the 1st day of July, 1899.

MILLARD PATTERSON,
Notary Public, El Paso County, Texas.

STATE OF TEXAS, }
El Paso County, Western District Texas. }

I hereby certify that Horace B. Stevens and Fred Shaefer, sureties on the foregoing bond, are each well worth the sum of one thousand dollars over and above all debts, liabilities, and exemptions, and said bond is a good and sufficient bond.

Witness my official signature and seal, at El Paso, Texas, this 1st day of July, 1899.

D. H. HART,
Clerk U. S. Circuit Court, Western Dist. Texas, at El Paso, Texas,
By J. P. HODGSON, *Deputy.*

Endorsed: Filed July 26, 1899. J. M. McKee, clerk.

42 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

(Filed —— —, ——.)

E. M. PATTON, Plaintiff in Error,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 724.

Error to the United States circuit court for the western district of Texas.

Before McCormick, circuit judge, and Boarman and Parlange, district judges.

Statement of the Case.

This cause has once previously been before this court on writ of error. It was then very fully stated. 23 U. S. App., 319, 61 F. R. 259. The only differences which are claimed to exist between the

evidence in the cause on the former writ of error and the evidence as now brought up on the present writ of error are to be found, on the one hand, in the testimony of A. Stiner, a witness in
43 behalf of the defendant below, which is now claimed by the defendant in error to be more strongly in its favor than on the first trial, and, on the other hand, in the testimony of Alexander Mitchell, a witness for the defendant below, who is now claimed by the plaintiff in error to have testified on the second trial in a different manner from that in which he had testified on the first. The testimony of Stiner, delivered on the second trial and found in the record of this cause, is as follows:

"A. Stiner, a witness in behalf of defendant, testified:

"I was the engineer in charge of engine No. 90 at the time plaintiff Patton was hurt, and was the engineer running that engine for some time before. Alexander Mitchell was a competent man to inspect engines. His employment at the time the accident happened was that of foreman at Toyah. The machinist at Toyah was a man named Young. There was no special inspector or repairer at Toyah at that time, any more than the foreman and machinist. It was the duty of anybody who was controlling the engine to see if anything was wrong. The machinist should do the work of grinding in the blower. The Chinamen did the work of putting in the gasket and changing water. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. When the engine went into Toyah, it was my duty as engineer to report defects in the engine and repairs to be made. It was my duty to examine the engine again before it left Toyah and see whether or not the repairs called for had been made. There was no other inspection upon my part to be made at Toyah before we left there."

The witness was asked the following questions:

"Q. The attorney for the plaintiff has asked you the question whether it was not a part of the duty of the foreman or machinist not simply to do the repairs pointed out, but to inspect the engine itself generally and see whether it was in good condition?

"A. Yes, sir; it was their duty to look around.

"Q. If the engineer overlooks anything, they might find it?

"A. There is times an engineer overlooks something. They might find it.

"Q. It is their business to look for it?

"A. O, yes; it is their business to look.

"Q. Do you know, as a matter of fact, whether the step was loose when the engine left Toyah?

"A. No, sir.

"Q. Did you examine the step at Toyah?

"A. I don't know as I examined it. I got off and on.

"Q. Did you examine the step to find out whether or not it was loose?

"A. No, sir; I did not pull on it or anything like that.

44 "Q. You don't know whether it was loose when it left Toyah or not?

"A. It was not loose when I got on it. The step was not loose when I got on it.

"Q. Did you examine it to see whether or not it was loose?

"A. I examined it with my foot. Down at Toyah I simply put my foot on the step and got up on the engine. I don't remember the run exactly now. I used the step at the San Martine tank or at Prairie and Van Horn, then again at Blanco and at Hancock, and whether I used it again between Hancock and El Paso I can't remember."

He also testified that the step was not loose when the engine left Toyah; that he examined it with his foot; and explained that he ascertained that it was not loose because he got up on the engine, using this step several times, as stated above, between Toyah and El Paso, and while one might get down from the engine and not discover it, that in mounting the engine after oiling he came from front of the engine and grabbed the hand-hold, put his left foot on this step, and swung his body round to place the right foot in the loop on the tender."

The testimony of Alexander Mitchell, a witness in behalf of the defendant below, was, on the second trial, as follows:

"On the 29th and 30th days of November, 1892, I was the round-house foreman of the Texas & Pacific Railway Company at Toyah. The company had a machinist at Toyah at that time. He was not at the round-house on Sunday. His name was Charley Young. When he was not there it was my duty to do the work, to a certain extent—little jobs. I remember the engine No. 90, on which the plaintiff Patton was employed, coming in."

The attorney for the defendant here called the witness' attention to the report made by the engineer when the engine reached Toyah on the night of November 29th, viz: "Change water, grind in blower, put gasket in front of blower pipe, and raise pilot, also." The witness was asked the following questions:

"Q. What did you do to that engine?

"A. I raised the engine in front without raising the pilot.

"Q. I mean, did you make the other repairs?

"A. No, sir; I did not.

"Q. The small repairs?

"A. No, sir; I did not.

"Q. State what you did.

"A. I put some clips or gibs under the springs to raise the pilot up.

"Q. Did you complete the job?

"A. I did.

"Q. Did you do anything with the part of the engine near the engine step on the right side?

"A. In order to do that I had the step off and jacks under it.

"Q. On the right side of the engine?

"A. Under that side to hold her up; I had to jack the front end

up in order to do the work, and hold the back end up off the springs.

"Q. That is what you did?

"A. Yes.

45 "Q. Did you have anything to do with the step?

"A. I had it off.

"Q. Did you put it back there?

"A. Yes, sir.

"Q. Did you put it back properly?

"A. Yes, sir; I had men working with me to do it.

"Q. Did you see it done?

"A. I seen it being done. I went into the office and came out again.

"Q. Did you examine the nut to see if it was put on right or not?

"A. The nut was screwed up tight.

"Q. The step was screwed up tight?

"A. Yes, sir; I am sure it was screwed up tight. It made two hundred miles.

"Q. What was the condition of the engine? Was that step in good condition when it left Toyah?

"A. It left in the morning.

"Q. When you got through with it?

"A. When I left the round-house the engine was all right.

"Cross-examination:

"Q. Did you put that jack-screw under the end of the engine?

"A. I had it put under.

"Q. You did?

"A. Yes, sir.

"Q. Did you take the step off?

"A. I had to have it taken off.

"Q. You saw it taken off?

"A. Yes, sir.

"Q. You could not take the step off without moving that nut at the top?

"A. No; I would have to take that off to take the step off.

"Q. Did you raise the pilot or not?

"A. I raised the front end of the engine and of course that raised the pilot.

"Q. That is the way you raised it?

"A. That is the way I raised it.

"Q. Were you there during the whole time the work was being done, about the engine?

"A. I think I was all the time that the work was being done on the engine in and about the office and about the round-house."

The witness Mitchell also testified that he had the step put back after taking out the jack screw, and that the nut was screwed back properly, and that the nut was tight when the engine left the round-house at Toyah.

The witness Mitchell was here asked (by counsel for plaintiff) if he did not testify on the former trial of this case, in October, 1893,

that the step was not moved for the purpose of putting the jack-screws under the end of the engine, and that the nut on the step was not moved while the engine was at Toyah on the trip mentioned, and that Mr. Young was a machinist at Toyah at that time; that it was Sunday, the 30th day of November, 1892, and he, Mitchell, believing that he was competent to do so, undertook
46 to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and finding that he could not accomplish the task of raising the pilot with the force at hand by himself, he did not do the work necessary to raise the pilot or cow-catcher. The witness replied that he had no recollection of so testifying.

He was then asked if he did not testify on the former trial of this case that the step mentioned in the evidence which turned with the plaintiff Patton was not moved at all while the engine was at Toyah on the 30th day of November, 1892, and if he did not testify that the nut by which this step was fastened was not moved at all on that trip. He said he had no recollection of so testifying.

The witness was then asked the following questions:

"Q. Did you put the gasket in the pipe?

"A. I did not.

"Q. Did you grind the blower?

"A. No, sir; I did not.

"Q. Why did you put the jack-screw under that end of the engine?

"A. I could not raise the engine and fix the engine without doing it.

"Q. You could not do what you did about the pilot unless you raised the engine?

"A. Unless I held the back part of the engine up.

"Q. So, in doing what you did about the pilot and in raising the pilot as you did raise it, you put these jack-screws under the end of the engine where the step was?

"A. I had it done; I was there to see it was done.

"Q. Were you a machinist then, Mr. Mitchell?

"A. No, sir; I ain't no machinist—that is, I never learned the trade.

"Q. That was a machinist's work you were trying to do, wasn't it?

"A. Well, yes, it was a machinist's work, although I can do it."

The witness was here asked if he did not testify on the former trial, in October, 1893, that to grind in the blower was a small job, and that he did it, and that to put gasket in front joint of blower pipe was a very light job, and he did it. He answered by saying that he had no recollection of so testifying.

The plaintiff then introduced in evidence the stenographic report of the testimony of Alexander Mitchell, taken upon the first trial of this cause, which was as follows:

"That he told the Chinamen to get the jack-screws, and under his direction they placed two jack-screws, one on each side of the front of the engine, and that without any instructions from him

they brought and put another jack-screw on the ground near the step; that he was out of the round-house five or ten minutes while the Chinamen were there, and that this jack-screw near the step was not placed under the engine in a position to elevate it, and that the step was not moved for the purpose of putting the jack-screws there, and that the nut on the step was not moved while the engine was at Toyah on that trip; that Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th day of November, 1892, and that he, Mitchell, believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and, finding that he could not accomplish the task of raising the pilot with the force at hand by himself,
47 he did not do the work necessary to raise the pilot or cow-catcher; that to grind in the blower was a small job, and the witness did this; that to put gasket in front of blower pipe was a very light job, and that this work was also done by the witness; that to raise the pilot required the witness to jack up the engine and put gibs under the spring ends of the engine truck; the engine truck is near the front end of the engine; that the witness did not do this because it was a pretty big job, and he was doing the work by himself, with the help of only two Chinamen; that the engine was all right and ran as well as if it had been done, except the pilot was a little low."

After the close of the evidence heard upon the second trial of the cause, the trial judge instructed the jury to return a verdict for the defendant below "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence on the part of the defendant;" to which instruction the plaintiff below duly excepted, insisting that the court should submit the cause to the jury upon the question of negligence raised by the pleadings and the evidence. The jury thereupon returned their verdict in favor of the defendant, The Texas and Pacific Railway Company.

E. M. Patton, the plaintiff below, sued out the present writ of error. The assignment of error complains that the court directed a verdict as stated above. He contends that the evidence on the second trial was materially different from the evidence upon the former trial, and that the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of the defendant's employés at Toyah, in leaving the step attached to the engine in a loose and unsafe condition, and that said employés were charged with the duty imposed by law upon the defendant railway company of inspecting the engine and keeping the various parts of the same in a reasonably safe and good condition, and that they negligently failed to perform such duty; that the evi-
48 dence tends strongly to show that the step which turned with the plaintiff and caused the injuries he received was in a loose condition when the engine left Toyah, and that the engine was not inspected by defendant's machinist at Toyah, and that after repairs were made upon the engine at Toyah the step was negligently left in a loose and unsafe condition.

PARLANGE, district judge (after stating the facts), delivered the opinion of the court:

When this cause was before this court during the November term of 1893 this court said, upon a careful examination of the entire evidence: "It seems to us that to state the case is sufficient to show that the defendant had not been negligent and could not justly be held liable. The exception to the charge of the court and to the refusal of the requested charge having served to bring up, in the bill of exceptions, a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous and must be reversed."

The cause was remanded to the lower court for further proceedings in conformity with the opinion of this court. At the close of the second trial below the judge directed a verdict in favor of The Texas & Pacific Railway Company, defendant below. The plaintiff below duly excepted to that action of the trial judge, and he has brought up all the evidence in the bill of exceptions.

49 It is clear that the opinion of this court on the former writ of error is the law of this cause and is still controlling therein, unless the evidence on the second trial was materially different from the evidence on the first trial.

This court, on the former writ of error, found substantially that by uncontradicted evidence the following facts, among others, were established, viz:

On Nov. 29, 1892, it became necessary to remove and replace the step in question. This was done by the engineer and the plaintiff himself. The nut which fastened the step was made tight. It was properly screwed on and would not have become loose in a trip from El Paso to Toyah and return. The step was not removed at Toyah. The engine left Toyah at 2 a. m. on the morning of Dec. 1st, 1892. During the return trip to El Paso the plaintiff below and the engineer got off the engine several times, on the right side, while it was standing, and neither of them noticed any disturbance of the step. When they reached El Paso, on the return trip, at about 10.30 a. m., on Dec. 1st, 1892, they left the engine attached to the train at the depot, both of them getting off the engine on the right side and using the very step in question. Neither of them noticed that anything was wrong with the step. They went to their homes. A few hours afterwards the plaintiff returned to the engine. It was then in charge of the employés of the railway company for the purpose of being coaled, sanded, and cleaned by others than the fireman, and it was thereafter to be inspected by the machinist.

50 The purpose of the plaintiff in then returning to the engine was to wipe off parts of the engine and to fill the oil cans and lubricators. He was not required *to*, but permitted, if he chose, to do that work at the time he did it. It was more convenient to do it while the engine and the oil were still hot. He would have had ample time, after the engine had been placed in the roundhouse, to do his work. While, as already stated, the engine was in

the hands of other employés for the purposes stated, the plaintiff undertook to do and proceeded with his work of cleaning parts of the engine and filling the cans and lubricators. The engine was in motion, running at the rate of about three or four miles an hour. It was about to stop, when the plaintiff, in order to get out of the way of other employés, and also for the purpose of getting off at the place where the engine was about to stop, stepped down backwards off the engine, using the step in question. The step turned, causing his right foot to fall under the driving wheel of the engine and to be crushed by it.

The only change in the evidence upon which the plaintiff in error relies for relief from the former decision of this court in this cause, and in fact the only difference in the evidence as heard on the first and on the second trials—except the evidence of the engineer Stiner, which is claimed by the defendant in error to be much stronger in its favor now than on the previous occasion—is that Mitchell, the round-house foreman at Toyah, testified on the first trial that he did not remove the step at Toyah, but that all repairs called for by the engineer were made, and, in a general way, that the engine on leaving Toyah was in good condition, whereas he testified on the second trial that he did remove the step at Toyah, but that he replaced it or caused it to be replaced properly, and that he is sure that the nut "was screwed up tight."

51 In our opinion, this change in the testimony of Mitchell cannot affect what was adjudicated by this court on the former writ of error. This court then found that there was no evidence of negligence on the part of the defendant railway company for which it could be made liable. Under the views then expressed by this court, what evidence of such negligence is there now to be found in the record? If either one of Mitchell's statements be true, the plaintiff in error can derive no benefit from it; for whether Mitchell did not take off the step at Toyah, or took it off and replaced it properly, the case must go against the plaintiff in error, under the views heretofore expressed by this court. If Mitchell, because of his contradictory statements, is unworthy of belief, his evidence should be disregarded and eliminated. But the fact that Mitchell made two contradictory statements, both of which are favorable to the railway company, cannot be held to be equivalent to or to supply the place of proof of negligence on the part of the railway company directly the reverse of either of the contradictory statements. A bare suspicion that Mitchell did not properly fasten the step at Toyah, arising merely from the fact that he made two contradictory statements, would not have warranted the jury in finding against the railway company.

The uncontradicted facts remain established that the plaintiff himself assisted in fastening the step at El Paso; that this was sufficient to secure the nut for the round trip to Toyah and back; that the step was used and was not loose while going and returning; that after the arrival at El Paso on the return trip the step was used by the plaintiff himself and was only found loose a few hours

afterwards, while the engine was under the control of other
52 employés of the railway, whose duty it was to coal it, sand it, and do such other necessary things as might be required, except repairing, and when the engine was to be taken immediately thereafter to the round-house, where it was to be inspected, and where it would, if necessary, have been repaired.

On such facts and under the views of this court expressed on the first writ of error, the plaintiff below could not recover.

The judgment of the lower court is affirmed.

53 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing fifty-three pages, numbered from a to fifty-two, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, in the case of E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company, defendant in error, No. 724, as fully and completely as the same remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 31st day of July, 1899.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

54 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between E. M. Patton, plaintiff in error, and The Texas and Pacific Railway Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 724. Writ of error. Filed July 26, 1899. J. M. McKee, cl'k.

55 UNITED STATES OF AMERICA, *ss*:

To the Texas and Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein E. M. Patton is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Service of the foregoing citation in error is admitted and accepted this the 29th day of July, 1899.

T. J. FREEMAN,
Att'y and Counsel for the Texas and Pacific Railway Company, Defendant in Error.

[Endorsed:] Citation in error.
Endorsed on cover: File No., 17,495. U. S. circuit court of appeals, 5th circuit. Term No., 381. E. M. Patton, plaintiff in error, *vs.* The Texas & Pacific Railway Company. Filed August 22, 1899.

No. 381.

Supreme Court of the United States

October Term, 1899.

E. M. PATTON,

PLAINTIFF IN ERROR,

VS.

THE TEXAS & PACIFIC RAILWAY COMPANY,

DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR E. M. PATTON, PLAINTIFF IN ERROR.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

E. M. Patton, plaintiff in error, filed in the District Court of El Paso county, Texas, on March 17th, 1893, his petition claiming damages against the Texas & Pacific Railway Company in the sum of twenty thousand dollars for personal injuries. (Printed Trans., pages 2-3). And petition and bond were filed by said rail-

way company for removal, and the case was removed to the United States Circuit Court, W. D. T., at El Paso, Texas. (Trans. Pr., pages 5 to 9) .On April 6, 1898, in the United States Circuit Court, W. D. T., at El Paso, Texas, the plaintiff—Patton—filed his First Amended Original Petition alleging that on December 1st, 1892, he was in the employ of defendant as a fireman on one of its locomotive engines, and that on said date while he was in the discharge of his duties as said fireman and while said engine was stopping near the sand house in El Paso, Texas, to have the fire cleaned out, and while it was moving very slowly, plaintiff attempted to step off said engine, so as to get out of the way of the fire-cleaner, who was about to enter upon said engine to clean out the fire. The step leading from the engine to the cab thereof was in a bad, defective and improper condition and was loose, so that when plaintiff attempted to step from said engine said step, being in such loose condition, turned, so that it threw plaintiff under said engine and caused him to fall, so that his right leg was thrown under said engine, and said engine ran over his right leg and it was bruised and lacerated and his right foot was mashed, and it became necessary to amputate his right leg about three inches above the ankle joint. That said amputation was performed and the plaintiff was confined to his room about two months, and he suffered great pain, etc. That defendant was negligent in not having said step in a good, proper and safe condition, and that in consequence of the negligence and carelessness of the defendant in not keeping said step, and not having same at said time in a good, safe and proper condition, and in having it and allowing it to be in a bad, defective and loose condition, plaintiff sustained the injuries above mentioned, and the

plaintiff was, in no degree, negligent. That at the time defendant knew or ought to have known and could have known by the exercise of reasonable diligence, that said step was in a bad, defective and loose condition, and plaintiff did not know and was not chargable with notice that said step was in such bad condition. That certain repairs were made upon said engine at Toyah, Texas, on November 30th, 1892, and that it was the duty of defendant to have had said engine inspected at Toyah before its return trip to El Paso, Texas, but through the negligence of said defendant said engine was not inspected before its return trip to El Paso, and through the failure of defendant to inspect the same said step was left in a bad, defective, unsafe and loose condition, so that the accident hereinbefore described was caused, and the plaintiff was injured as above mentioned. (Trans. Pr., pages 9-10).

The defendant railway company filed its second amended original answer on April 8th, 1898, setting up certain special exceptions to the plaintiff's petition which were not urged, and a special answer, in which it was admitted that the plaintiff was a fireman upon one of the defendant's engines as stated in his petition, and that at the time stated in his petition plaintiff's duty was to act as fireman on defendant's engine No. 90, which engine was engaged in hauling passenger trains over defendant's road from El Paso to Toyah and from Toyah to El Paso. That at the time the plaintiff was injured he was working about said engine out of the line of his duty, and he voluntarily got upon said engine while the same was in charge of the yardsmen, before the same had been repaired or placed in the round house, and negligently tried to get out of said engine while it was in motion, and thereby, by his own negligence, contributed to the injuries he received. That the

engine was provided with the proper step and defendant kept suitable and competent inspectors who inspected it, and suitable and competent machinists, whose duty it was to repair said engine and who did repair it when necessary. And that said engine was carefully inspected, but inspection failed to discover a defect, if any there was, in said step. And further, that the plaintiff had full opportunity to know the condition of said machinery and apparatus and that he was chargable with equal knowledge of said defect, if any, with the defendant, and that if the plaintiff received the injuries alleged by him, and such injuries were caused by any negligence upon the part of employes of the defendant; that such employes were fellow-servants of the plaintiff. (Trans. Pr., page 11).

The case was tried at the April term, 1898, of the United States Circut Court, W. D. T., at El Paso. The defendant railway company requested the court to instruct the jury, after the evidence was all in, to return a verdict for the defendant, "because there is not sufficient testimony to entitle the plaintiff to recover, and no evidence showing any negligence upon the part of the defendant," which said instruction was given by the court to the jury, and the plaintiff excepted to the court's action before the jury retired and rendered his bill of exceptions and insisted that the court should submit the case to the jury upon the question of negligence raised by the pleadings and evidence, and thereupon the jury returned the verdict which is copied in the judgment of this cause, and the court rendered judgment thereupon against the plaintiff. (Trans. Pr., page 14).

Plaintiff's bill of exceptions was duly prepared and filed on the 12th day of April, 1898. (Trans. Pr. pp. 16-26). On April 13, 1898, the plaintiff in error filed his assignments of errors, with

his petition and bond for writ of error, taking said cause to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, La. (See Trans. Pr. pp. 26-30). And the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans rendered a judgment on March 21, 1899, affirming the judgment of the trial court. (Trans. Pr. p. 30.)

The assignments of error urged by E. M. Patton, plaintiff in error, before said United States Circuit Court of Appeals at New Orleans, are shown on pages 26-27 transcript (print.) and the same embodies and presents the same points substantially as are now urged in our assignments of error before this honorable court.

Our petition for a writ of error, our assignments of error, and our bond for writ of error to the United States Circuit Court of Appeals at New Orleans, were filed on July 26, 1899. (Trans. Pr. pp. 31-34.) Service of citation in error was duly admitted and accepted July 29, 1899. (Trans. Pr. p. 43.)

This honorable court has jurisdiction over this cause, as the defendant railway company was chartered by Act of Congress. There have been two trials of this case. At the first trial judgment for the plaintiff was set aside by the Circuit Court of Appeals April 10, 1894, that honorable court RE-TRYING AN ISSUE OF FACT which had been passed upon by a jury in the trial court, as we have always maintained, in contravention of the seventh amendment to the Constitution of the United States. The opinion by the judges, and the dissenting opinion by Toulmin, D. J. are reported in 61 Fed. Rep. pp. 259-273. A writ of error was taken to this honorable court and dismissed at the October term, 1896, for the reason that the judgment below was not final.

As we have shown, at the second trial, April 12, 1898, the

trial court instructed the jury to return a verdict for the defendant because there is no evidence showing any negligence on the part of the defendant, and the cause being again taken to the United States Circuit Court of Appeals that court affirmed the judgment of the trial court.

We now urge the following specifications and assignments of error:

First: Said United States Circuit Court of Appeals for the Fifth Circuit erred in refusing to sustain the first assignment of error urged by the plaintiff in error and in refusing to hold that the trial court erred to the prejudice of plaintiff in instructing the jury as follows: "To return a verdict for the defendant, because there is not sufficient testimony to entitle the plaintiff to recover and no evidence showing any negligence on the part of defendant." Said instruction was erroneous, as the evidence in the case tended strongly to show that the injury of which the plaintiff complains was the direct result of negligence on the part of the defendant for which it is legally liable, and presented an issue of fact which should have been submitted to the jury. The evidence upon this (second) trial was materially different from the evidence upon the former (first) trial of this case, and the evidence tends strongly to show that the plaintiff's injuries were received through the negligence of defendant's employes at Toyah, in leaving the step attached to the engine in a loose and unsafe condition; that said employes were charged with the duty imposed by law upon the defendant of inspecting the engines and keeping the various parts of and about the same in a reasonably safe and good condition, and that they negligently failed to perform such duty.

Second: The evidence upon the trial tended strongly to show that the step which turned with the plaintiff and caused the injuries which he received through its being loose was in a loose condition when the engine on which the plaintiff was employed left Toyah, and that the engine was not inspected by the defendant's machinist at Toyah, and after repairs were made upon the engine at Toyah the step was negligently left in a loose and unsafe condition.

STATEMENT.

Plaintiff testified that on the day he was injured he had been doing some of his work on the engine at El Paso, and that at this time the engine was moving very slowly, not more than three or four miles an hour, and he, plaintiff, had gotton off of the gangway and was standing with his face to the engine, on the right side of same, with his right foot on the step hereinbefore mentioned, and his left foot on the tender; that the step mentioned was attached by a rod to the rear of the engine, and the plaintiff, desiring to get out of the way of the fire cleaners, as the engine passed the sand house, and for the purpose of stopping there and waiting until the fire was cleaned, had stepped off of the engine in a careful and proper manner, that is, by detaching his left hand and foot from the tender and stepping down on his left foot. That he was on the right side of the engine, which was backing, and the pressure of his right foot turned the step in such a manner as to throw it around close to the rear driving wheel of the engine, and plaintiff's right foot was thrown immediately under the driving wheel and the wheel passed over his right foot and crushed it so that amputation became necessary. The cause of the turning

of the step when plaintiff fell was on account of the nut on the end of the rod, which should have held the step secure and in position, that is, the nut which came down on the top of the casting at the upper end of the rod not being taut, but the same was loose, leaving the rod to which the step was attached so it could be easily turned. (Trans. Pr., p. 19). This engine left El Paso for Toyah November 20, 1892, and on that day this step was taken off at El Paso, and plaintiff assisted the master machinist at El Paso, Mr. Rossiter, in tightening up said nut. The master machinist, Rossiter, and the plaintiff testified that the nut was properly screwed on at El Paso, and would not have become loose in the trip from El Paso to Toyah and return. (Trans. Pr., pp. 17-18). All of the witnesses, excepting A. C. Wheeler, superintendent and foreman of the defendant at El Paso, testified that the nut above described, used to tighten the step, would not work loose in making the trip from El Paso to Toyah and back by the ordinary jarring and running of the engine, but that it might come loose by the step having struck against something. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. (Trans. Pr., p. 20). It was proven that the nut and threads of the step-rod were in good condition and had not worked loose since the accident to plaintiff. (Trans. Pr., p. 20).

It is the duty of the engineer who operates the engine to inspect and report all defects and repairs necessary on the engine in a book kept for that purpose at each place at the end of his run, and in this instance at El Paso and at Toyah. (Trans. Pr., p. 19). It was the duty of the machinist or foreman not only to do the repairs which are reported as necessary by the engineer, but to inspect the engine itself and to see whether it was in a good con-

dition, so that if the engineer shall overlook anything they might find it. (Trans. Pr., p. 22). The plaintiff, with engine No. 90, and the train to which it was attached, left El Paso, Tex., for Toyah, on November 29, 1892, which was Saturday, and arrived in Toyah on the night of November 29, 1892, at 11:30 p. m. When the train reached Toyah the engineer, Mr. Stiner, reported that repairs were necessary on his engine. The report of the engineer in the book at Toyah provided for that purpose shows that the following repairs were to be made: "Change water; grind in blower; put gasket in front of blow pipe; raise the pilot." To raise the pilot required the engine to be jacked up, and that gibs be put under the spring end of the engine truck. The engine truck is near the front end of the engine. (Trans. Pr., p. 18).

The engineer, Stiner, testified as follows:

Question: Do you know as a matter of fact whether that step was loose when the engine left Toyah?

Answer: No, sir.

Q. Did you examine the step at Toyah?

A. I don't know as I examined it. I got off and on.

Q. Did you examine the step to find out whether or not it was loose?

A. No, sir; I did not pull on it or anything like that,

Q. You don't know whether it was loose when it left Toyah or not?

A. It was not loose when I got on it.

Q. Did you examine it to see whether or not it was loose?

A. I examined it with my foot. Down at Toyah I simply put my foot on the step and got up on the engine. I don't remember the run exactly now. I used the step at the San Martine tank,

or at Prairie and Van Horn. Then again at Blanco and at Hancock, but whether I used it again between Hancock and El Paso I cannot remember.

He explained that he ascertained it was not loose because he got up on the engine, using this step several times, as stated above, between Toyah and El Paso; "and while one might get down from the engine and not discover it, that in mounting the engine after oiling, he came from the front of the engine and grabbed the hand hold and put his LEFT FOOT on this step and swung his body around to place the RIGHT FOOT in the loop on the tender." (Trans. Pr., p. 22).

(The court will allow us to remark here that Stiner was evidently talking about the other step, that is, the step over on the other side of the engine, and not the step which turned and caused the injury to Patton. The court has already realized that the step which turned and caused Patton's injury was on the right side of the engine, and it would be impossible for the engineer, Stiner, to get upon the engine by placing his left foot on the step which turned with Patton and his right foot in the loop on the tender. Stiner's meaning is evident to any one; that is, that he got down from the engine on the right side, which as this court must know, is the engineer's side, went around the engine from the right side, oiling it, and placed his left foot on the step over on the left side, and his right foot in the loop on the tender on the left side in order to get up into the engine on the left side of the engine).

The machinist at Toyah was a man named Young. The machinist should do the work of raising the pilot. It is the foreman's business to see that the machinist did it. (Trans. Pr. pp. 21-22.)

We now call attention particularly to the testimony of the witness Alexander Mitchell. He says: "On the 29th and 30th days of November, 1892, I was the round-house foreman of the Texas & Pacific Railway at Toyah. The company had a machinist at Toyah at that time. He was not at the round-house on Sunday. His name was Charley Young. When he was not there it was my duty to do the work to a certain extent—little jobs." (Trans. Pr., p. 23).

The plaintiff, Patton, also testified that Young, the machinist, was not at Toyah on Sunday, November 30, 1892. (Trans. Pr., p. 21).

We offer the following to show, in a convenient way, the contrast between the testimony of Alexander Mitchel on the second trial in April, 1898, and his testimony given on the first trial of this case:

The references are to the printed transcript:

MITCHELL'S TESTIMOMY.

ON FIRST TRIAL.	ON SECOND TRIAL.
The step was not taken off at Toyah. (Trans. p. 25). The nut on the step was not moved while the engine was at Toyah on that trip. (Trans. p. 25.) I found that I could not raise the pilot with the force at hand by myself, so I did not raise the pilot. (Trans. p. 25.) I did put the gasket in the pipe. (Trans. p. 25.) I did grind in the blower. (Trans. p. 25.) The jack-screw near the step was not placed under the engine in a position to elevate it. (Trans. p. 25.)	The step was taken off at Toyah. (Trans. p. 23.) I had to remove the nut in order to get the step off. (Trans. p. 24.) I raised the pilot and in order to do that I had the step off and jacks under it. (Trans. p. 23.) I did not put the gasket in the pipe. (Trans. p. 24.) I did not grind in the blower. (Trans. pp. 24-25.) In order to raise the pilot I put the jack screws under the end of the engine where the step was. (Trans. p. 25).

The witness, Mitchell, said that he had no recollection of testifying to anything that appears in the above left hand column, on the first trial of this case. (Trans. Pr. p. 25). The record shows that on the first trial this witness, Mitchell, testified that "to raise the pilot required the witness to jack up the engine and put gibs under the spring end of the engine. That the witness did not do this because it was a pretty big job and he was doing the work by himself with the help of only two Chinamen. That the engine was all right and ran as well as if it had been done, except the pilot was a little low." (Trans. Pr. pp. 25-26).

On the second trial said witness testified as follows:

Question: State what you did about the engine.

Answer: I put some clips or gibs under the springs to raise the pilot up.

Q. Did you complete the job?

A. I did.

Q. Did you do anything with the part of the engine near the engine step, on the right side?

A. In order to do that I had the steps off and jacks under it.

Q. Did you have anything to do with the step?

A. I had it off.

Q. Did you put it back there?

A. Yes, sir.

Q. Did you put it back properly?

A. Yes, sir; I had men working with me to do it.

Q. Did you see it done?

A. I seen it being done. I went into the office and came out again.

Q. Did you examine the nut to see if it was put on right or not?

A. The nut was screwed up tight. It made 200 miles. (Trans. Pr. p. 23).

On cross-examination he testified as follows:

Q. Were you a machinist then Mr. Mitchell?

A. No, sir, I aint no machinist, that is, I never learned the trade.

Q. That was a machinist's work you were trying to do wasn't it?

A. Well, yes, it was a machinist's work, although I can do it. (Trans. Pr. p. 25.)

The plaintiff, Patton, testified that he never used the step after he left Toyah until he arrived at El Paso. He thinks he only got off the engine once between Toyah and El Paso and that was at Sierra Blanca for breakfast, and that he got off on the left side. (Trans. Pr. p. 21.) He did not know the said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured. (Trans. Pr. p. 20.) It was proved without controversy that the manner in which the plaintiff got off the engine backward was a careful and prudent manner and in the usual manner of alighting from an engine whether in motion or standing still, and if said step had been in repair there was no danger in the manner in which the plaintiff alighted from the engine. (Trans. p. 20.) And it was proved that the plaintiff, Patton, was acting in the line of his duty and was in the discharge of his duty at the time the accident happened and he was injured. (Trans. Pr. p. 20).

In view of the foregoing testimony, we offer the following propositions of law.

First: If upon any construction which the jury is authorized to put upon the evidence, or any inference they can draw from the evidence, the conclusion of negligence can be justified, the question of negligence must be left to the jury. Sioux City & Pac. Ry. Co., vs. Stout, 17 Wallace, 657. Weightman vs. Washington, 1 Black p. 39. Holladay vs. Kennard, 12 Wallace, 254. Randall vs. B. & O. Ry. Co., 109 U. S. 478.

The following authorities are all to the effect that the question of negligence must be submitted to the jury, and this includes not only cases where the facts are in dispute, but also where the question is as to the inference to be drawn from such facts after they have been determined. And they hold that the question of negligence must be submitted to the jury in cases where there may be a fair difference of opinion as to whether the inference of negligence should be drawn.

Dunlap vs. Railway Co., 130 U. S. 652.

Railroad Company vs. Powers, 149 U. S. 44.

Grand Trunk Ry. Co. vs. Ives, 144 U. S. 408.

Wash. & G. Ry. Co. vs. Tobriener, 147 U. S. 571.

Railway Co. vs. Converse, 139 U. S. 469.

We call particular attention to the case of Patton vs. Southern Ry. Co., 82 Fed. Rep. 979, which was tried before Chief Justice Fuller, Goff, Circuit Judge, and Brawley, District Judge. In this case the court says: "In all actions founded on negligence,

whenever the facts are in dispute or conflicting, or the credibility of witnesses is involved, or the preponderance of testimony, and wherever the facts admitted or not denied are such that fair-minded men might draw different inferences from them, it is a case for a jury, and a case should not be withdrawn from the jury unless the inferences from the facts are so plain as to be a legal conclusion."

We insist that the case at bar is identical in all of its material features with the case of Railway Co. vs. Daniels, 152 U. S. p. 684, and in that case the Honorable Supreme Court laid down the identical rule for which we are here contending, and applied the same so clearly to similar facts that there can be no excuse hereafter for any one's failing to understand it.

Second. The undisputed testimony shows that a defect existed about the engine of defendant, and that while the plaintiff was engaged upon the same he was injured. And this defect was of such a character as raised a reasonable presumption of negligence on the part of some one connected with the defendant's business, and for whose negligence it is liable to the plaintiff.

In Jensen vs. The Joseph B. Thomas, 81 Fed. Rep. 578, it appears that the plaintiff was a stevedore and was working in the lower hold of the vessel under the forward hatch. The hatch covers had been taken off and piled one on top of the other very close to the hatchway. A keg that had been freshly painted was placed on these covers to dry. The keg belonged to the vessel, and in some way, or by some one, the evidence not disclosing how or by whom, the keg was knocked over and fell down the hatchway,

injuring the plaintiff. It was held that negligence would be implied and a judgment for the plaintiff was affirmed. This case cites many others which hold with it that the doctrine of implied negligence obtains in master and servant cases as well as in others. See as directly in print:

Carroll vs. C. B. & N. R. Co., 75 N. W. p. 176.

Cummings, vs. Furniture Co., 18 N. W. p. 742.

We invite this honorable court's attention especially to the case of Houston vs. Brush, 29 Atlantic Rep. 380, where the plaintiff was a servant of the defendant, who furnished a derrick for the plaintiff to use in their work, in which he was engaged; while he was thus using it he was injured without his fault, by the falling of the wheel from the tackle-block attached to the top of the mast of the derrick. This block had two wheels in it, which were fastened in by a steel pin passing through the block; one end of the pin had a square head, which by means of a mortice, was sunk into the upper side of the block so that it was flush with it, and the other end of the pin was flush with the other side of the block. When the block came from the shop where it was manufactured a small piece of tin was tacked on over the square head of the pin to keep it from working out. The plaintiff's evidence tended to show that on the day of the accident this tin had come off and the pin had worked out far enough to let the wheel out and it fell and injured him. The defendant requested the court to give the following instruction to the jury, viz: "The mere fact that the pin came out of the block is not sufficient to authorize any inference or presumption that the defendant failed to exercise ordinary care." This instruction was refused by the trial court, and the ruling sustained. The case is from the supreme court of Vermont; and the

court says: "Without attempting to formulate a rule embracing every case to which the maxim is to be applied, we think it is clear from the authorities cited that when the defendant owes a duty to the plaintiff to use a certain degree of care in respect to the thing causing the accident, to prevent the occurrence of such accident, and the thing is shown to be under the management of the defendant or his servants, and the accident in such case as in the ordinary course of things does not occur if those who have the management use proper care, it affords evidence, in the absence of evidence showing that it happened without the fault of the defendant, that the accident arose from the lack of the requisite care. In such a case the occurrence itself, unexplained, shows prima facia a shortage of duty on the part of the defendant." The court says further: "The doctrine of res ipso loquitur has been more frequently invoked and applied in actions against carriers of passengers than in any other class of cases. An attempt has been made by some law writers to limit the application of the rule to cases growing out of the contractuai relation, but there seems to be no reason for such a limitation." Mr. Wood, in Sec. 389, of his work on Master and Servant, says: "It is not necessary that the servant should do more than to raise a reasonable presumption of negligence or fault on the defendant's part. Therefore, if a defect is shown to exist, and the accident results while the servant is engaged upon such defective machinery, in the absence of proof as to the manner in which the injury was inflicted negligence may be inferred by the jury."

In Greenleaf vs. I. C. Ry. Co., 29 Iowa, I4, (s. c. 4 Am. Rep. 181) which was a case between master and servant, it was held that the plaintiff is not bound to raise by his proof more than a

reasonable presumption of negligence on the part of the defendant.

In the case of Ross vs. Stevens and the Conduit Transfer Co., (11 Fed. Rep. p. 438) the court says: "It is contended, however, that it was error to instruct the jury that they may infer such negligence from the fact of the explosion of the boiler, and it is argued that such presumption only obtains when the defendant is under a contractual obligation to the plaintiff, as in the case of a common carrier or bailee. Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in justice or reason for any such a limitation of the rule of evidence. The presumption originates from the nature of the act and not from the nature of the relationship between the parties. It is indulged as a legitimate inference whenever the occurrence is such as in the ordinary course of things does not take place when proper care is exercised."

In Shearman vs. Redfield on Negligence, Vol. 1, Sec. 58, it is said that the plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and resulting injury to himself. Having done this, he is entitled to recover unless the defendant produces evidence sufficient to rebut this presumption. It has been sometimes held not sufficient for the plaintiff to establish a probability of the defendant's fault, but this is going too far. If the facts proved make it probable that the defendant violated his duty, it is for the jury to decide whether he did so or not. To hold otherwise would be to deny the value of circumstantial evidence.

In the case of McRay vs. G. H. & S. A. Railway Co., 98 Texas, p. 168 (S. W. Rep. Vol. 34, p. 95), it appears that a brake-

man was killed by a steel rail falling from a train upon which he was at work. One end of the rail struck the ground and the other end resting on the side of the car swept the whole north side of the train and struck McRay, who was sitting on the north side of the car, killing him instantly. The supreme court of Texas made the following quotation which it fully endorsed, and added that it was amply sustained by the authorities, both English and American, viz:

"There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

All of the cases to which we have referred simply emphasize a rule laid down by the supreme court of the United States many years ago, in the case of Stokes vs. Saltonstall 13 Peters (U. S.) p. 181.

Third: The evidence shows that it was the duty of the engineer to inspect the engine at Toyah, and at stations between Toyah and El Paso, and to report defects, etc. In so far as his duty to inspect the engine was concerned, he was not a fellow servant with the plaintiff. When this case was before the U. S. Circuit Court of Appeals the first time it used the following language: "It may not have been the duty of the fireman to inspect this step, but it

was the duty of the engineer, and they were fellow servants." (See Fed. Rep. Vol. 61, p. 295.)

In the case of A., T. & S. F. Ry. Co., vs. Mulligan, 67 Fed. Rep, 569, Justice Wood, delivering the opinion of the court says: "A locomotive engineer charged with the duty of inspecting his engine is not, in respect to the duty of such inspection a fellow servant of a hostler or helper engaged in switching engines in the railroad yard." And the case of B. & O. Ry. Co., vs. Baugh, 149 U. S. 368, is cited in support of the proposition, and by examination of the Baugh case it will be seen that it does support it fully.

In the Baugh case the United States Supreme Court says: "Therefore it will be seen that the question turns rather on the character of the act than on relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master.

In the case of Coontz vs. M. P. Railway Co., 26 S. W. Rep. 661, the supreme court of Missouri holds that an engineer whose duty it was to inspect his engine was not as to such act the fellow servant of the conductor in charge of the same train; that, as to the matter of inspection the engineer represents the company, and his neglect to inspect his engine properly was the negligence of the company. This case cites many others in support of the holding, and among them the case of Railway Company vs. Herbert, 116 U. S. 642, which fully sustains the holding.

In the case of Sabine & E. T. Ry. Co., vs. Ewing, 21 S. W. Rep. p. 700, the court of civil appeals of Texas holds as follows: "The fireman on a locomotive, injured because of a defect in the coupling between the locomotive and tender is not precluded from

recovering from the company because the engineer was negligent in failing to inspect the coupling. This being the duty of the company such negligence of the engineer is its negligence and not the negligence of a fellow servant."

In Railway Co., vs. Herbert 116 U. S. 642, the supreme court of the United States holds, "That as an obligation rests on the master to furnish suitable machinery and to keep the same in repair, he is responsible for the negligence of those persons in his service on whom he has devolved the duty of inspecting the machinery and the appliances and seeing that they are kept in a proper condition for use." The same doctrine is announced in King vs. Railway Co., 14 Fed. Rep. 277, and Carpenter vs. Railroad Co., 39 Fed. Rep. 315; Little Rock & M. Co., vs. Mosely, 56, Fed. Rep. 1009. This last case also cites the Baugh case, 149 U. S. 368 as sustaining the same doctrine and the law of the case at bar is well stated in the case of Huff vs. Railway Co., I00 U. S. 213.

In the case of Van Dusen vs. Letellier, 44 Northwestern, Rep. 572 the supreme court of Michigan, speaking of the duty of a master to inspect and keep machinery and appliances in good order, says: "If he can not do this himself personally he must provide some other person to take his place, in this respect, and the person to whom the master's duty is thus delegated, no matter what his rank or grade, no matter by what name he may be designated, can not be a servant in the sense or under the rule applicable to injuries occasioned by fellow servants. Such person is an agent, and the rules of law applicable to principals and agents must apply. In order to keep the machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections

and examinations, and he can not escape responsibility by delegating this duty to one who in other respects may be a fellow servant of the person injured by the failure to properly perform his duty." And in support of this doctrine, in the case mentioned, the Supreme Court of Michigan cites a large number of cases, and among them the case of Railway Co., vs. Herbert, 116 U. S. p. 642. In an opinion rendered by Judge Shiras the U. S. Circuit Court D. Minn., holds that engineers and firemen in such a case are not fellow servants, 42. Fed. Rep. p. 383.

In the case of T. & N. O. Ry. Co. vs. Bingle, 41 S. W. Rep. 90, the Court of Civil Appeals of Texas holds that an engineer whose duty it was to inspect and report defects in his engine is not a fellow servant of the fireman.

In the case of Nall vs. L. N. A. & C. Ry. Co., 38 Northeastern Rep. 183, the supreme court of Indiana, in speaking of the rule for determining who are fellow servants, says: "This must be determined not from the title given him, or from his rank in the master's service, but from the character of the duties imposed upon him, and which he was performing when deceased was killed. The law imposes certain duties upon the master, the performance of which he can not delegate to an agent so that he can not escape responsibility. Whether the master assumes to discharge these dutes in person or entrust them to another, he is in either case the actor. The agent to whom he entrusts such duty, regardless of his rank, acts as the master and in his place."

The following Federal cases all hold that the employe whose duty it is to inspect machinery is not a fellow servant with those who are using it. King vs. Ohio & M. Ry. Co., 14 Fed. Rep. 277. Little Rock & M. Ry. Co. vs. Mosely, 56 Fed. Rep.

1009. Northern Pac. Ry. Co. vs. Herbert, 116 U. S. 642. Huff vs. T. & P. Ry. Co., 100 U. S. 213. Carpenter vs. Mexican National Ry. Co., 39 Fed. Rep. 315. B. & O. Ry. Co. vs. Baugh, 149 U. S., p. 368.

Fourth: In view of the testimony of the witness Alexander Mitchell, the case should have been submitted to the jury, because his credibility as a witness was directly in issue, and the plaintiff had the right to have the jury determine that fact, and as his was the only evidence that the step was put back properly after it was taken off at Toyah by the Chinamen, the question of his veracity became an important one.

In the case of Robinson vs. N. Y. C. & H. R. Ry., 9 Fed. Rep. 877, the court says: "Where the testimony to rebut the presumption of negligence proceeds from persons who would be guilty of a criminal fault unless they VINDICATED themselves from such presumption, a question of credibility is presented for the jury."

In Chicago G. W. Ry. Co. vs. Price, 97 Fed Rep., p. 432, the United States Circuit Court of Appeals for the Eigth Circuit said, where a witness had changed his testimony and made two contradictory statements:

"Both of these statements were not true, and if he testified falsely on one material issue the jury and the court were permitted to disbelieve his testimony upon the other. The credibility of such a witness and the effect that should be given to his testimony were questions peculiarly within the province of the jury."

In the case of London vs. W. U. Tel. Co., 45 N. Y. 549, the

court says: "From the necessity of the case, all such evidence as theirs to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as an admission would subject him or her to severe responsibility for the consequences. This is the controlling consideration in determining whether the statements of these witnesses should be taken as conclusive. Without imputing a want of truthfulness to these witnesses, we think that THEIR RELATION TO THE SUBJECT MATTER IN CONTROVERSY WAS OF ITSELF SUFFICIENT to take from the court the right to dispose of the case upon their evidence, and to require that the jury should pass upon the weight to be given to their statement."

In the case of Wohlfahart vs. Becker, 92 N. Y. 489, the court says: "Where, however, in such case, the only evidence that such warning was given was that of the druggist's clerk who sold the poison as the jury was at liberty to disbelieve him, he being an interested person, having violated the law by omitting the label, held that the question as to whether the warning was given, was one for the jury, and it was error to direct a verdict for the defendant."

In the case of Gildersleeve vs. London, 23 N. Y. 609, the court says: "Where the credibility of a witness is impeached, his testimony cannot be taken as conclusive, although uncontradicted, and the question of fact as to the weight his testimony is given must be submitted to the jury." In the same case it is held that where the witness is interested in the question, although he is not directly impeached, and his testimony is uncontradicted, his credibility is a question for jury, and the court is not warranted in directing a verdict upon his testimony alone.

In the case of Dorsey vs. Town of Phillips, 22 Federal Reporter 634, the court says: "Where there is some intrinsic improbability in the witness' narrative, or he has shown himself unworthy of credit BY HIS ATTEMPT TO FALSIFY THE TRANSACTION, the question of fact should be submitted to the jury."

As we have heretofore shown in this brief, the witness Alexander Mitchell either swore falsely on the first trial of this case or on the last trial. By an inspection of the opinion of the court rendered when the case was first taken up (See Fed. Rep., Vol. 61, 259), it will be seen that the court's judgment was based largely upon the positive direct statements of the witness Alexander Mitchell, which statements were directly and flatly contradicted by him on the last trial. We are thoroughly satisfied that the court would not have reversed and remanded the case on the first hearing if there had been presented to the court such an array of facts as are now presented by the record; and we think that the testimony now shows conclusively that after the Chinamen took off the step and raised the rear end of the engine with the jack-screw at Toyah, when they put it back they left it in a loose and dangerous condition; and we say furthermore that it is plain that neither Mitchell nor any other person inspected or examined the engine afterward. To our minds, Mitchell's own contradictory and evasive statements show clearly that he is conscious of

the fact that he did not perform his duty, in so far as he had any duty to perform in the premises. He confesses that he is not a machinist, and that it was the machinist's duty to inspect the engine at Toyah before its return to El Paso. And we say that it is clear that no one inspected it, and that on account of the fact that the step was left in a loose and dangerous condition the plaintiff in this case lost his right leg.

Fifth; It cannot be said that the evidence of the engineer Stiner would justify the trial court in taking the case from the jury, because he does not testify that he made any proper inspection of the step. His statement respecting the matter amounts simply to the assertion THAT HE USED THE STEP IN GETTING UP INTO THE ENGINE, and did not discover when he stepped upon it that it was loose. Even if the mere stepping upon the step by Stiner is to be regarded as an inspection in any sense, the sufficiency of such inspection was a question of fact for the jury to determine, and they had the right to determine it from all the facts in the case.

In the case of C. C. C. & St. L. Ry. Co. vs. Ward, 46 Northeastern 462, the supreme court of Indiana says: "To excuse the master from liability to the servant resulting from defective machinery on the ground that the machinery had been inspected, it

must appear not only that the inspector was competent, but also that the inspection was a reasonably careful one."

In the case of Sheedy vs. C. M. & St. P. Ry. Co., 57 Northwestern 60, the supreme court of Minnesota, in the case of the loosening of a nut, and a case almost identical in its features with the case at bar, says: "The question as to whether or not the fact that the nut had worked back on the bolt could have been discovered by a reasonably careful inspection, was for the jury to determine, and that an examination of the nut and bolt to discover whether the same were apparently in good order was within the duty of the proper car inspector while the car was in route." The court further says: "Of course, all the inspection required is to see whether the bolt is securely fastened in its place, and this falls within the ordinary duties of the inspector of cars while en route."

The case of Bailey vs. R. W. & O. Ry. Co., 34 N. E. Rep. 318 (from New York) is a case where the pin in the bottom of a brake rod worked loose, and when the brakeman attempted to use the brake he was injured. The absence of the pin could not be seen by one working the brake, but an inspection of the brake under the car would have disclosed its absence." Held, that it was for the jury to determine whether or not it was negligence in the defendant not to have discovered the absence of the pin, and it was error to direct a verdict for the defendant.

In the case of G. H. & S. A. Ry. Co. vs. Templeton, 25 Southw. Rep. 135 (Texas), the Court of Civil Appeals of Texas, (the facts being almost identical with those in the case last

cited) held that the plaintiff was entitled to recover, and a rehearing was refused by the supreme court of Texas.

In the case of Railroad Company vs. Ives, 144 U. S. p. 409, the court said: "It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court." And in Gardner vs. Mich. Cen. Ry. Co., 150 U. S. 361, substantially the same language is used and the same idea has been repeatedly and forcibly expressed by this court.

As has been well said by Justice Coldwell of the Eighth Circuit, "The opinion of even a majority of the court does not express the conclusion all reasonable men, or any considerable number of such men, would draw from the evidence in the case. Neither a majority nor a minority of the appellate court is empowered to decide questions of fact. The constitutional mode of ascertaining the sense of reasonable men on disputed questions of fact in common law actions is by the verdict of twelve jurymen and not by the opinions of the judges. It was because the people knew the judges were poor judges of the facts that they committed their decisions to a jury, and every day's experience confirms the wisdom of their action. The plaintiff has a constitutional right to have the facts of his case tried by a jury." And in the case of Railway Co., vs. Stout, 17 Wallace 657, the Supreme Court of the United States said, many years ago: "Even if the facts are undisputed it is for the jury and not for the judges to determine whether proper care was given or whether they established negligence."

In conclusion we desire to emphasize the following points:

In the first place, there is not a particle of evidence about Patton's ever having used this step which proved to be in a bad

and dangerous condition, on a single occasion after the engine left Toyah on the El Paso run. We proved on the trial, as the bill of exceptions shows, that the step which turned was several inches lower than that on Patton's left side, and if there is any presumption about the matter it would be that as the engine was standing still on all occasions when Patton got off of it on the run from Toyah, he did not use the lower step or the defective step at all. The step or loop which was on the tender was on the left side of Patton, or the engineer or any one else getting out of the gangway backwards, alighting in the proper way from the engine, and this loop was about six inches higher than the step which was loose, and a man would place his left foot in the loop and naturally would very seldom use the step on the right side at all in the mere act of getting on or off the engine, and as the step projected directly toward the outside and away from the engine, a man might step onto or off of the engine without ever detecting that it was loose, and the only way in which the fact that it was loose could have been ascertained was by an INSPECTION of it or by pressure being brought to bear latterally upon it.

Again, it was just as much the business of the machinist at Toyah to inspect the engine, as it was the business of the machinist at El Paso to inspect it, and it was just as much the duty of the company to inspect the engine at Toyah before its return as it was the duty of the company to inspect the engine at El Paso. There is no testimony whatever that the machinist whose business it was to inspect the engine at Toyah, after the run of 196 miles from El Paso ever inspected it at all, and there is no testimony whatever that anybody ever inspected it at Toyah.

It was at no time and nowhere admitted in the case, and

there is nothing whatever in the bill of exceptions to indicate, that the foreman Mitchell and the other employes of the railway company at Toyah were either competent or made any effort to discharge their duty. On the contrary it is shown positively by Mitchell's own testimony that he was incompetent and an unfit man for the place he held. He himself testifies as we have shown that he was trying to perform the machinists duty, because he believed he could do it, and he said on the first trial that he gave up the work and failed to do the most important thing the engineer had directed to be done, that is, to raise the pilot, because, as he says, he had only two Chinamen to help him and he "let it go."

We insist that in the light of the evidence it was a physical impossibility for the step to have become loose as it was with the application of some manual force brought to bear upon the threads of the nut or the threads of the step rod which should have fastened and held the step-rod securely. This court will take judicial knowledge of the fact that a screw or a nut turns from left to right, and locating the step, the step-rod, the nut, the engine, the tender and Patton correctly, we must see that it would have been utterly impossible for the step to have turned toward the right and thrown Patton's leg under the driving wheel which was only a few inches to Patton's right in front of the step, unless the step had already been turned or the nut left so as to allow at least a full revolution. Unless the rod and the step had already been turned all the way around at least once or the nut had been turned so as to allow a revolution any pressure of Patton's right foot upon the step as he was standing would only have made the step tighter, if possible.

If we understand the decisions of the Honorable Supreme

Court of the United States to which we have hereinbefore referred, they are to the effect that if the step which was so loose that it could be easily turned, (and through the looseness of which Patton was injured) became and was loose, or was allowed to be loose through any negligent act or want of any act upon the part of the highest or the humblest servant of the defendant below, whose duty it was to see that the same was left in a secure and safe condition, then the defendant below is liable.

We submit most earnestly that the evidence introduced on the trial of this cause before the jury might in all reason have satisfied the jury that a machinist or an engineer or some other employe was negligent, or that the company was negligent in not having the engine inspected at Toyah, or was guilty of negligence in many ways, else the step could not have been in the condition in which it was. And we insist upon the rule as laid down by the honorable Supreme Court of the United States in the case of Texas & Pacific Railway Co. vs. Archibald, 170 U. S., p. 665, "that an employe of a railroad company has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection."

We respectfully ask that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and of the trial court be reversed and the caused remanded.

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Supreme Court of the United States.

OCTOBER TERM—1900.

E. M. PATTON,
Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

No. 123.

STATEMENT.

The statement in the brief of plaintiff in error omits to recite that plaintiff testified:

"I had my work to do on the engine at Toyah, and I remember getting off of it late in the afternoon of the Sunday mentioned, and when I got off of it *on the right side* after I did my work, I saw the jackscrews sitting about the engine. This was about the time I left the engine and went to supper. * * * I do not think that I used this step in getting off the engine on the way from Toyah back to El Easo. After we got to El Paso we got off on *the right side.* I don't remember whether I used the step" (Tr., p. 21).

The Engineer, Stiner, testified that he used the step several times on the return journey to El Paso (Tr., p. 22).

After reviewing the evidence, the Circuit Court of Appeals said :

" The uncontradicted facts remain established that the plaintiff himself assisted in fastening the step at El Paso ; that this was sufficient to secure the nut for the round trip to Toyah and back ; that the step was used and was not loose while going and returning ; that after the arrival at El Paso on the return trip the step was used by the plaintiff himself, and was only found loose a few hours afterwards while the engine was under the control of other employees of the railway, whose duty it was to coal it, sand it, and do such other necessary things as might be required, except repairing, and when the engine was to be taken immediately thereafter to the round-house, where it was to be inspected, and where it would, if necessary, have been repaired.

" On such facts, and under the views of this court expressed on the first writ of error, the plaintiff below could not recover " (Rec., pp. 11, 12).

In the first appeal (61 Fed. Rep., 259), the Court, as then constituted, held, after reviewing the evidence, that there was nothing to show negligence on the part of the railway company.

BRIEF.

I.

The plaintiff failed to prove any negligence on the part of the Railway Company, and the trial Court for that reason correctly instructed the jury to find a verdict for the defendant.

The rule of law governing this case upon the record is clearly announced in Delaware, &c., Railroad vs. Converse, 139 U. S., 469, 472, as follows :

"Undoubtedly questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phenix Ins. Co. vs. Doster, 106 U. S., 30, 32.; Griggs vs. Houston, 104 U. S., 553; Randall vs. Baltimore and Ohio Railroad, 109 U. S., 478, 482; Anderson County Commissioners vs. Beal, 113 U. S., 227, 241; Schofield vs. Chicago and St. Paul Railway Co., 114 U. S., 615, 618.* 'It would be an idle proceeding,' this court said in *North Penn. Railroad vs. Commercial Bank, 123 U. S., 727, 733,* 'to submit the evidence to the jury when they could justly find only in one way.'"

In this case the Circuit Court of Appeals, on the first hearing, actually did set aside a verdict for plaintiff on the ground that there was no evidence of negligence by the Railway Company (*61 Fed. Rep., 259*; s. c. *23 U. S. App., 319*); and on the second hearing the same court held that the defect in plaintiff's case had not been cured (Tr., pp. 40–41).

This honorable Court has exercised the same power under similar circumstances (*Wiborg vs. United States, 163 U. S., 632.*

We insist that the first point made in the brief of plaintiff in error (p. 14), namely, that, "If upon any construc tion which the jury is authorized to put upon the evidence, or any inference they can draw from the evidence, the conclusion of negligence can be justified, the question of negligence must be left to the jury," is not applicable to this case, for the reason that, upon the face of the record, no such

inference can be drawn nor any such conclusion justified.

The testimony as it appears in the record has been twice carefully reviewed by the Circuit Court of Appeals for the Fifth Circuit. That court, in its opinion upon the first writ of error, said :

> " It seems to us that to state the case is sufficient to show that the defendant had not been negligent and could not justly be held liable. * * * It appears from the face of the record that there was no evidence to sustain the judgment of the Circuit Court. It is thus manifestly erroneous and must be reversed " [61 Fed. Rep., 269–70].

In its last opinion in which the judgment under review was pronounced the above extract was quoted and the court remarked [Tr., p. 40] :

> " It is clear that the opinion of this court on the former writ of error is the law of this court and is controlling, unless the evidence on the second trial was materially different from the evidence on the first trial."

The only differences in the testimony, taken upon the two trials, upon which plaintiff in error relies are that the testimony of the engineer Stiner was more favorable to plaintiff upon the second trial than it was upon the first; and that upon the second trial Mr. Mitchell testified that the step had been removed during the making of the repairs at Toyah, while he testified on the first trial that it was not taken off. On the second trial he testified that the step was properly replaced and that the nut holding it in place was " screwed up tight " [Tr. p. 23].

We respectfully submit that the testimony of Mitchell as given at the second trial did not in any way tend to prove any negligence on the part of the defendant in error.

We also submit that plaintiff in error fails to point out any testimony showing negligence by the Railway Company. Both the engineer and plaintiff testified in effect that they had no reason to suspect that the step had become loosened. The engineer used it repeatedly on the return journey and plaintiff admits that he got on and off the engine by means of it after the repairs at Toyah were completed and again on arriving at El Paso, but he could not remember that he had occasion to use it during the journey [Tr., p. 21].

Certain it is upon the evidence that plaintiff's opportunities for discovering any defect in the adjustment of the step after the engine left Toyah were precisely the same as those of the engineer and that they were the only persons who had any opportunity whatever to inspect the step or to do anything to it from the time the engine left Toyah until the time when the accident occurred. It is evident that the defect by which it is alleged the accident was caused could not be discovered by the best of all inspections—*actual use* of the step.

In *Railway Company vs. Daniels, 152 U. S., 684, 691*, relied upon by the plaintiff in error as identical in all of its material features with the case at bar, the following charge of the trial judge was approved:

> "As between employer and employee, between master and servant, as in this case, negligence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of."

We do not overlook the rule stated in *Texas & Pacific Ry. Co. vs. Archibald, 170 U. S., 665*, also relied upon by plaintiff in error, viz., that "an employee has the right to rest on the assumption that

appliances furnished are free from defects *discoverable by proper inspection.*" But we insist that it does not apply to the case at bar, because in the record there is no proof that the Railway Company did not exercise *reasonable care* to make its appliances safe, nor that the defect in the step existed prior to the accident or, if so, that it was discoverable by inspection. The presumption, as well as the proof, is that it did exercise reasonable care.

The most favorable view of the testimony offered by plaintiff as found in the record is that he proved that the step on the engine was found to be loose after the accident, though there was nothing to lead those inspecting or using it previously to suspect that anything was wrong with it, nor to show that, if it was loose prior to the accident, its condition could have been discovered by inspection.

We submit, therefore, that the action of the trial court in directing a verdict for the defendant was not only justified but was the only action the court could take upon the record and the law.

II.

The question whether the engineer of the engine and the plaintiff, who was the fireman, were "fellow servants," as to inspection or otherwise, is not here for review, because it is not presented by any assignment of error.

The only error assigned in the record relates to the direction of the court to the jury to find a verdict for

the defendant because no negligence by the Railway Company had been proven [Tr., p. 31].

The question as to "fellow servants" is a matter of defense, and as such its discussion before plaintiff has established a *prima facie* case is premature and unnecessary.

On the first appeal in this case, reported in 61 Fed. Rep., 259, the judges of the Circuit Court of Appeals used this language (p. 268):

> "It may not have been the duty of the fireman to inspect this step, which he was constantly using, on the run from El Paso to Toyah and return, but it was the duty of his engineer, and they were fellow servants."

The proposition that the engineer and fireman were fellow servants is contested in the brief on the other side in this case. We answer:

FIRST. The Circuit Court of Appeals having in this case, upon the first appeal, decided that the engineer and fireman were, as far as relates to the duty of the engineer to inspect the engine, fellow servants, and the testimony on the second trial being exactly the same as on the first trial, that court had no jurisdiction to reverse its former decision.

Balt. & O. Ry. Co. vs. Baugh, 149 U. S., 368.
Tyler vs. Maguire, 17 Wall., 253.
Washington Bridge Co. vs. Stewart, 3 How., 413.
Sibbald vs. United States, 12 Peters, 488.
The Santa Maria, 10 Wheat., 431.
Frankland vs. Cassady, 62 Texas, 418.
Stacey vs. Vermont Cent. Ry. Co., 32 Vt., 552.

Wells on Res Adjudicata & Stare Decisis, Sec. 613.
23 Am. & Eng. Ency. of Law, 33.

SECOND. The testimony on the second trial being the same as on the first, it was the duty of the Circuit Court to respect and follow the decision rendered by the Circuit Court of Appeals in this case, and to direct a verdict for the defendant.

See cases last cited.

THIRD. The common-law doctrine that the master is not liable for the negligence of a fellow servant in the same employment is a rule which, without any question or dispute, obtains in the state of Texas. The relations of the engineer and fireman, and the circumstances of this particular case, show that it falls within the general rule of fellow servant, and not within the rules established in some exceptional cases, where one servant is supposed to stand in the place of the master in respect of a duty which is personal to the master and incommunicable by him to others. Upon the record it was the duty of the engineer to report in a book kept for the purpose, upon his arrival at the end of a journey, any repairs which it was necessary to make to the engine. Defendant had competent inspectors to inspect engines in the yards, and at the time of the accident the inspectors and mechanics had had no opportunity, under the routine and customs as to handling, coaling, sending and clearing engines, to inspect the engine by which the plaintiff was injured, and this was well known to plaintiff (Rec., p. 19). In this case the engine had not arrived at the roundhouse when the accident occurred, but was in the charge of the "hostler,"

being coaled and cleaned, as was usual before being placed there, and there had been no opportunity for the inspection customarily made of the engine on its arrival. If there was any duty which was personal to the master, and which he could not delegate unaccompanied with responsibility for the neglect of the servant, that duty rested on the inspector, and was known to the plaintiff to rest there, and he, knowing this, jumped or stepped off a moving train without waiting for it to stop, and when he knew as much about the step as the engineer could have known, and without waiting for the inspection of the step to be made in the usual and customary manner and at the proper time and place—the roundhouse. We say, under these circumstances, the law will regard the engineer and the plaintiff as fellow-servants, and the circuit court of appeals was clearly right in so holding.

III.

The fact that the testimony of a witness on the second trial of this cause differed from that given by him on the first trial on points not material to the decision of the only question assigned for error, does not furnish ground for reversing the judgment herein.

We do not dispute the rule that the credibility of a witness is for the jury and not for the court to determine; but we urge and insist that where the discrepancy in

the testimony of such a witness has no bearing upon the only question to be determined by this honorable Court under the error assigned, the judgment under review will not be reversed for the mere purpose of submitting to a jury the credibility of the witness. The Circuit Court of Appeals well said:

"But the fact that Mitchell made two contradictory statements, both of which were favorable to the railway company, cannot be held to be equivalent to or to supply the place of proof of negligence on the part of the railway company directly the reverse of either of the contradictory statements. A bare suspicion that Mitchell did not fasten the step at Toyah, arising merely from the fact that he made two contradictory statements, would not warrant the jury in finding against the railway company" [Tr., p. 41.]

IV.

The judgment under review should be affirmed.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Of Counsel.

Supreme Court of the United States.

No. 123.—October Term, 1900.

E. M. Patton, Plaintiff in Error, vs. The Texas and Pacific Railway Company. } In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 7, 1901.]

Plaintiff in error, plaintiff below, brought his action against the defendant to recover for injuries sustained while in its employ as fireman. A judgment in his favor was reversed on April 10, 1894, by the Circuit Court of Appeals. (23 U. S. App. 319; 9 C. C. A. 487.) On a second trial in the Circuit Court the judge directed a verdict for the defendant, upon which judgment was rendered. This judgment was affirmed by the Circuit Court of Appeals, (37 C. C. A. 56,) and thereupon the case was brought here on error.

The facts were that plaintiff was a fireman on a passenger train of the defendant, running from El Paso to Toyah and return. Some three or four hours after one of those trips had been made and while the engine of which he was fireman was being moved in the railroad yards at El Paso, plaintiff attempted to step off the engine, and in doing so the step turned and he fell so far under the engine that the wheels passed over his right foot, crushing it so that amputation became necessary. Plaintiff alleged that the step turned because the nut which held it was not securely fastened; that the omission to have it so fastened was negligence on the part of the company, for which it was liable.

Mr. Justice Brewer delivered the opinion of the Court.

The plaintiff's contention is that the trial court erred in directing a verdict for the defendant and in failing to leave the question of negligence to the jury.

That there are times when it is proper for a court to direct a verdict is clear. "It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. (*Phoenix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Griggs* v. *Houston*, 104 U. S. 553; *Randall* v. *Baltimore & Ohio Railroad*, 109

U. S. 478, 482; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *Schofield* v. *Chicago & St. Paul Railway Co.*, 114 U. S. 615, 618.)" *Delaware &c. Railroad* v. *Converse*, (139 U. S. 469, 472.) See also *Aerkfetz* v. *Humphreys*, (145 U. S. 418;) *Elliott* v. *Chicago, Milwaukee &c. Railway*, (150 U. S. 245.)

It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. (*Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43.)

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions.

While it would needlessly prolong this opinion to quote all the testimony it is proper that its salient features should be noticed. The single negligence charged is in the failure to have the engine step securely fastened. That step, a shovel-shaped piece of iron, is firmly fixed to a rod of iron about an inch in diameter and eighteen inches in length, which passes up through the iron casting at the rear of the engine, about six or eight inches thick. A shoulder to this rod fits underneath the casting and the part passing through above has threads on the upper end upon which a nut is screwed firmly down on the casting, fastening the rod so that it will not move. That the step, rod and nut were in themselves all that could be required is not disputed. That the nut was properly screwed on at El Paso, before the engine started on its trip, is shown; the plaintiff, who assisted there, testifying to the fact. The engineer testified that he used the step both on the trip to Toyah and the return trip to El Paso and found it secure, and there is nothing to contradict this evidence. The engineer in his report of needed work both at Toyah and on his return at El Paso did not mention the step. He certainly supposed it secure. Competent inspectors were provided by the company both at El Paso and Toyah, and neither of them detected any failure in the secure

fastening of the step by the nut. All of the witnesses except the superintendent and foreman of defendant testified that if the nut had been securely fastened at El Paso it would not have worked loose in making the trip from El Paso to Toyah and return by the ordinary jar and running of the engine; that it might be loosened by the step striking something. The superintendent and foreman testified from an experience of twenty years with engines that it might work loose on such trip, but that it was impossible to tell whether it would or not.

It was the duty of the fireman to clean the cab and all that portion of the engine above the running board, and to keep the oil cans and lubricators filled with oil. It was not necessary for him to attend to this work until eight hours after the engine arrived at El Paso, though it was more convenient to do so while the engine was hot and the oil warm, as it would take less time than when the engine was cooled off. After the engine reached El Paso the fireman and the engineer would get off and it would be taken charge of by the yardmen, who would detach it from the train, take it to the yard, coal and sand it and do all things necessary except the matter of repair, then place it in the round house where it would be cleaned by employees other than the fireman in all its parts beneath the running board, and inspected by the machinist and repaired; and after that the fireman would have ample time for all the duties imposed upon him before the engine started on another trip. All this the plaintiff knew, and simply took the time he did for his work for his own convenience. On this particular day he did not commence work until three or four hours after the arrival of the train at El Paso. Prior to that time the engine had been coaled up, the coal being placed in the tender back of the engine. Some of the pieces of coal were from a foot to eighteen inches in length and from six to eight inches in width, and very heavy, and one of them falling off might strike the step. The engine had not at the time of the accident reached the round house for inspection and repair, and this the plaintiff knew.

From this outline it appears that the master provided perfectly suitable appliances, and appliances in good condition; that they were properly secured when the engine started on its trip, and that it is impossible to tell from the testimony how the step was loosened. It may have been from the ordinary working of the engine, the possibility of which was testified to by the superintendent, who had had long experience with engines. It may have been because the step struck something on its trip, which striking might produce that result according to the testimony of other experts who denied that the ordinary working of the engine would loosen it. We say this notwithstanding the testimony of the plaintiff that the step did not hit anything on the trip, for the step was on the right side of the engine, the side occupied by the engineer, and therefore a striking

might have occurred without the knowledge of the plaintiff, whose work did not call him to that side of the engine. It may have resulted from the dropping on the step of some of the large lumps of coal which were thrown into the tender after reaching El Paso. We are not insensible of the matter to which the plaintiff calls especial attention, to wit, a conflict between the testimony given by Alexander Mitchell, the round house foreman at Toyah, at the first trial, and that given by him at the last. At the first trial he testified that the step was not taken off at Toyah. In the last that it was. He also testified that though taken off it was securely fastened before the train left. The inference, of course, sought to be drawn is that the testimony of this witness is unreliable; that it is to be believed that he unscrewed the nut, but not to be believed that he screwed it up tightly, and therefore another possibility of the cause of the loosening of the step is introduced into this case. But giving full weight to this suggestion, it still appears that it is a mere matter of conjecture as to how the step became loose.

On the other hand, it must be remembered that the plaintiff, who knew that the engine was to be taken to the round house at El Paso and inspected and repaired before he was called upon to perform any duties upon it, for his own convenience, before such inspection and repair went on the engine and attempted to discharge his duties of cleaning, &c. If he, knowing that there was to be an inspection and repair and that he had ample time thereafter to do his work, preferred not to wait for such inspection and repair but to take the chances as to the condition of the engine, he ought not to hold the company responsible for a defect which would undoubtedly have been disclosed by the inspection and then repaired.

Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, (*Stokes* v. *Saltonstall*, 13 Pet. 181; *Railroad Company* v. *Pollard*, 22 Wall. 341; *Gleason* v. *Virginia Midland Railroad Co.*, 140 U. S. 435, 443,) a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. (*Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617.) Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some

of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. Third. That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. (*Hough* v. *Railway Company*, 100 U. S. 213, 218; *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, 386; *Baltimore & Potomac Railroad* v. *Mackey*, 157 U. S. 72, 87; *Texas & Pacific Railway* v. *Archibald*, 170 U. S. 665, 669.) He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.

The rule in respect to machinery, which is the same as that in respect to place, was thus accurately stated by Mr. Justice Lamar, for this court, in *Washington &c. Railroad Company* v. *McDade*, (135 U. S. 554, 570):

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employee or servant."

Tested by these rules we do not feel justified in disturbing the judgment approved as it was by the trial judge and the several judges of the Circuit Court of Appeals. Admittedly, the step, the rod, the nut, were suitable and in good condition. Admittedly, the inspectors at El Paso and Toyah were competent. Admittedly, when the engine started on its trip from El Paso the step was securely fastened, the plaintiff himself being a witness

thereto. The engineer used it in safety up to the time of the engine's return to El Paso. The plaintiff was not there called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer. The judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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